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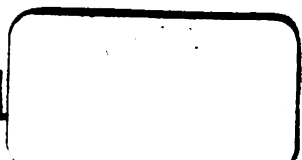
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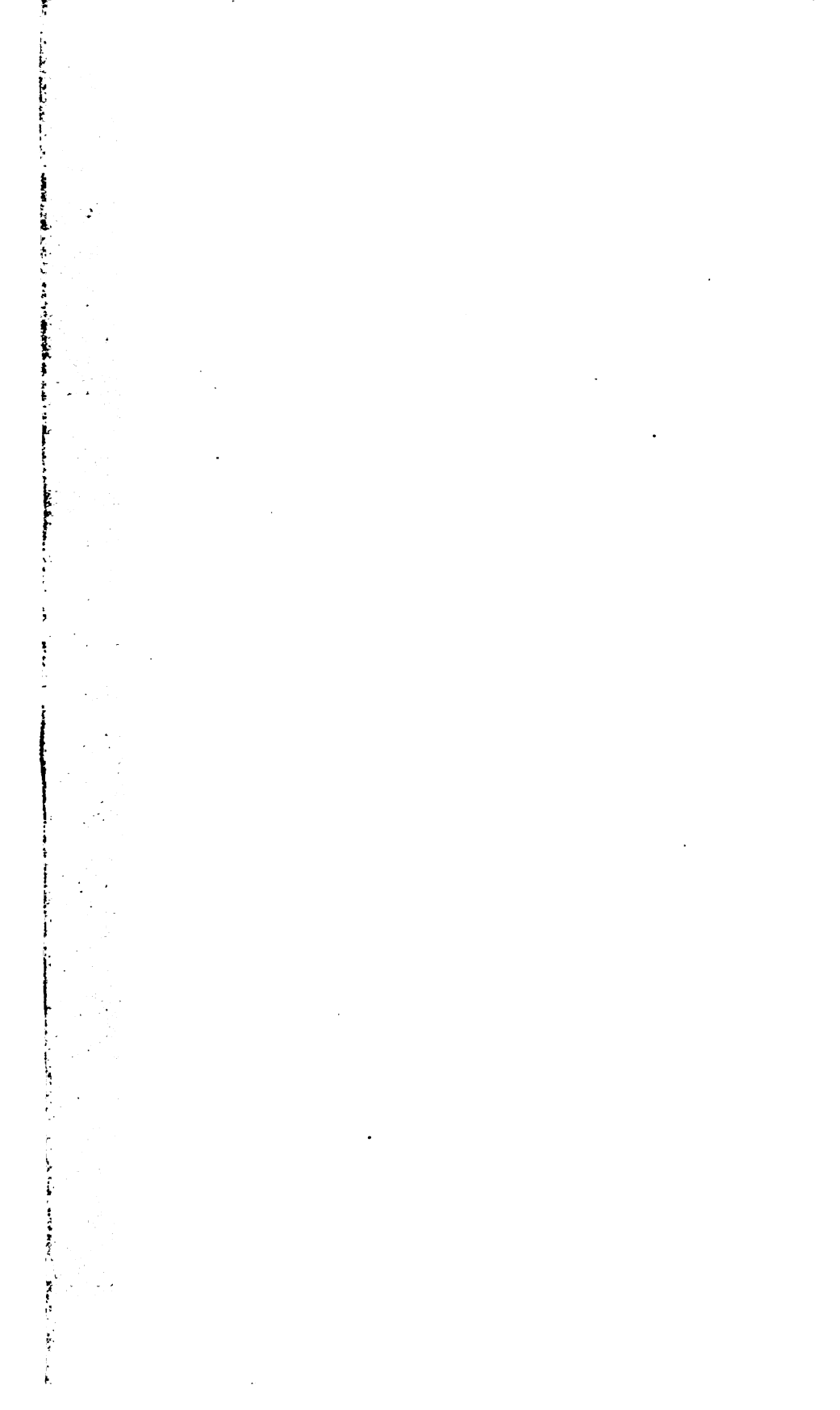


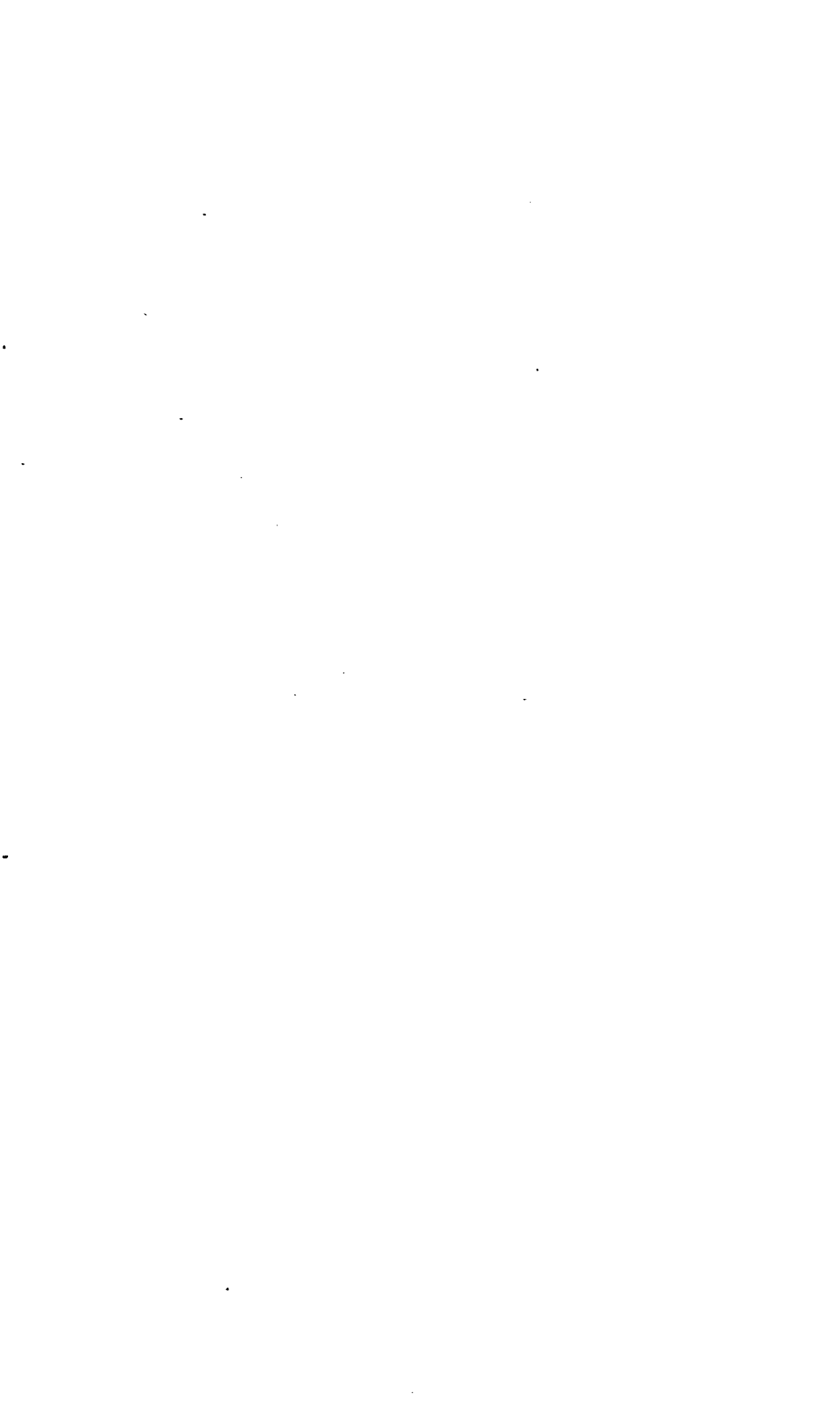
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*The plaintiff Bank was the Standard Bank not the Bank of Africa.

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*The plaintiff Bank was the Standard Bank and not the Bank of Africa.

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CAPE LAW JOURNAL.

REMINISCENCES OF THE CAPE BAR AND CAPE BENCH.*

BY THE HON. MR. JUSTICE COLE.

Some two years ago a Capetown publisher suggested to me the task of writing a volume of Reminiscences of the Cape Bench and Bar. The idea pleased me, but I saw that, to do justice to the subject, I should need assistance from others as it would be impossible to fill a volume fairly from my own experience only. A circular was accordingly issued and sent to every lawyer in the Colony requesting contributions of facts and anecdotes in connection with the Judges and Advocates who have played their parts on the Bench and Bar in South Africa. Unfortunately no answers were received. Whether learned gentlemen were deterred from giving their personal reminiscences by the modesty which is so characteristic of the legal profession, or from indifference to the subject, I know not. It was sufficient for me that I had to abandon the contemplated task.

When in September last two energetic members of the committee of this Jubilee Exhibition visited Kimberley, one of them (who is also one of my oldest friends) told me that he wanted *me* to assist in the project, for a moment I was puzzled to know in what possible way I could be of any service, when he told me that "lectures" and readings were to be given during the holding of the Exhibition and he thought so well of me as to believe that I could write something worthy of being read. It was an opinion with which I was far from coinciding; but as no man is allowed to be a judge in his own case, I yielded to the request of Dr. Ather-

*A Lecture delivered by the Hon'ble Mr. Justice A. W. COLE at the Queen's Jubilee South African Exhibition in Grahamstown, in January, 1888.

stone and consented to try my hand at a short sketch of the kind of reminiscences with which I had once hoped to fill a volume.

In the Master's Office in Capetown there is a nondescript article of furniture made of laurel wood and cane. It is something like five cane-backed and cane-seated chairs all joined together. It is as strong and serviceable as it was on the day on which it was made, though it must date from the commencement of this century. It is *the* bench of the old High Court of Justice of the Cape of Good Hope ; the bench on which used to sit the five grave and reverend signors who were the Judges under the Batavian Government of this Colony. One can imagine them with their pointed beards, flowing robes, big ruffles, three cornered hats and long clay pipes. "Pipes on the Bench !" you will exclaim. Quite true, however, their Honours used to smoke diligently while listening with all gravity to counsel and witnesses. The late Sir CHRISTOFFEL BRAND used to say that he had seen them thus engaged, and he silyly added that it had one good effect—it prevented Judges from perpetually interrupting Advocates in their arguments which I fear is a propensity with which some of us are afflicted.

What a number of changes since the time when that venerable piece of furniture upheld the men who upheld the laws of the country ! Can you imagine Sir JACOB BARRY and his two junior Judges each with a yard of clay in his mouth, and each only half visible through the clouds of smoke of his own raising ? Whether the Advocates were also allowed to smoke I cannot say, but I believe the luxury was reserved for the Bench.

In the year 1832 the Royal Charter of Justice creating the Supreme Court of the Colony was issued, and on the 1st March, 1834, that Court held its first sitting. The Judges were the Chief Justice, Sir JOHN WYLDE, Mr. Justice BURTON and Mr. Justice MENZIES. Of these, the only one still living when I joined the Cape Bar was Sir JOHN WYLDE, though he had already been struck by paralysis, and was unable to take his seat on the Bench. I made his acquaintance, nevertheless, and found him an exceedingly pleasant and genial old gentleman, with the manner and style of speech of a bygone generation. He was a brother of the celebrated Sergeant Wylde, afterwards Sir Thomas Wylde, and eventually Lord TRURO and Lord Chancellor of England. Apparently the

brothers were no great admirers of each other. Sir JOHN used to say "That brother Tom of mine owes all his success to his loud voice and boisterous manner." Sir THOMAS said "Poor JOHN mistook his vocation: he ought to have gone on the stage." There was a little truth in both opinions. Sir THOMAS was a very noisy advocate, but a man of vast ability. Sir JOHN had not a tenth part of his brother's legal knowledge, and certainly was apt to be theatrical in his manner and language. One or two stories will indicate his propensity in that direction. A woman had been convicted of the murder of her husband, and Sir JOHN, who had to pass sentence of death on her, thus addressed her—"Woman! woman! where is thy husband?" which the interpreter rendered by "Vrouw, vrouw, waar's uw man?" Sir John continued—"Alas! he has gone to that bourne from whence no traveller returns!" The interpreter said "Hij is op tocht gegaan."

Fortunately Sir JOHN knew no Dutch, or he might hardly have appreciated the interpreter's ingenious translation of his Shakesperian sentence. On another occasion he addressed a convicted thief as "You miserable man," and the same interpreter rendered it "Gij verdeomd schelm!" Even Sir JOHN's ignorance of Dutch could not hide from him the fact that the interpreter had rendered him as using profane language on the Bench, and his reproof to that gentleman is said to have been eloquently indignant.

Judge BURTON is reported to have been one of the most conscientious of men, and it is a fact that before taking his seat in Capetown he paid a six months' visit to Holland, in order to acquire a knowledge of Dutch. I don't know of any stories connected with his name: but the anecdotes about his brother-Judge MENZIES are innumerable. He was especially an irritable man, though a more learned or clear-headed lawyer never sat on the Cape Bench. He was a great admirer of our system of jurisprudence and had but scant respect for English law. When an advocate once quoted a case tried in the Queen's Bench, the Judge exclaimed "Well Sir! and if the Court of Queen's Bench chooses to lay down bad law, am I bound to follow it?" He had a great objection to being bored, and coming into a Circuit Court one morning, and seeing a row of books in front of one of the advocates, his face assumed an air of intense disgust and he thus addressed

the unhappy counsel—"You don't mean to say that you are going to read all those books to *me*, Sir, do you?" I don't know what the reply was, but I venture to guess that the books were *not* all read. He could enjoy a joke well enough. At the Port Elizabeth Circuit Court two of the barristers (both afterwards Judges) determined to play a trick on a third one, and to make it quite successful they previously let the Judge into their secret. They got someone to sew up, surreptitiously, the arm-holes of Mr. H.'s bar-gown. A case was called in which Mr. H. held a brief; he rushed to the side-room and seized his gown—the thing would not come on: he plunged about, and twisted the thing up and down; he struggled, but in vain. Meanwhile the Judge, assuming an air of great annoyance, kept crying "Where's Mr. H.? Why does he keep the Court waiting? It's really shameful." Poor H. rushed into Court, and as he reached the bar-seats there was his gown right over his head and he making violent efforts to get into it. The Judge fell back in his seat and rolled with laughter, in which the whole Court joined.

In the Circuit Court of George a case was called on before the same Judge, Mr. E. held the Plaintiff's brief. Now Mr. E. was a very clever advocate, but seldom took the trouble to really study his brief. On the present occasion he had scarcely looked at it, and having to state the case to the Judge earlier than he expected he made a blunder at almost every sentence. The attorney who instructed him was a very nervous and fidgety little man, and sat behind him. He kept crying in a loud whisper—"No, Sir—no; read your brief, Sir." Mr. E. continued blundering till the attorney could endure it no longer. Rising up, he seized Mr. E.'s ears from behind (they were very large ones), and swinging his head from side to side, shouted "Read your brief!" It would be difficult to say who in the Court was most astonished. The poor little attorney, realizing what he had done, fell on his knees and entreated his lordship's pardon, but he really "could not help it." The Judge was half stifled with smothered laughter and a loud guffaw burst from all the rest of the assemblage, except from Mr. E. Eventually the attorney was let off with a severe reprimand and the case postponed for an hour, so that Mr. E. might read his brief.

The first Attorney-General of the Colony after the establishment of the Supreme Court was Mr.—afterwards Sir Anthony—Oliphant, father of the celebrated living author, Lawrence Oliphant. Sir Anthony must have been an eccentric character. He appears to have never been on good terms with his wig—for they wore wigs in the Supreme Court in his days—which used to get twisted about in an extraordinary way so that on one occasion he was startled by finding his nose being tickled by one of the little horse-hair tails which ought to have rested on his back. Being an inveterate smoker he always went outside the Court when he had finished his speech, and smoked in the porch where he could still hear his adversary's argument. In the days of the old High Court of Justice no doubt the Judges would have granted him a special dispensation to smoke in the Court itself.

His successor was a very different stamp of man, a profound lawyer, a brilliant orator, a scholar and a man of taste—above all the most generous and kind-hearted of men—William Porter. To mention his name anywhere in South Africa from farthest East to furthest West is to secure for it an enthusiastic reception. Of all the men I have known, not connected with me by ties of blood, he was my best loved and truest friend. A volume might be filled with instances of his generosity, not only to those whom he knew well, but to persons all but strangers to him. As a matter of course he was often victimised by unscrupulous people and might have suffered more severely still if it had not been for the keen watchfulness of an old friend who resided with him. The oddest thing is that while this friend did all he could to protect Mr. Porter from imposters, he was himself very liable to fall a victim to them; for under a rough exterior he had one of the softest and gentlest of hearts. The contrast between these two men was, in some respects, very great. William Porter was courteous to every one, and found it difficult to utter a harsh word even to those who deserved it. Hugh Lynan (for that was his friend's name) was brusque almost to rudeness, and never cared to conceal his contempt if he felt it. In the office of the Attorney-General the friends always sat together, on opposite sides of the same table. On one occasion a highly placed official came to the office to announce his promotion to a still higher place elsewhere. "Well,"

said Mr. Porter, in his most genial terms, "I congratulate you sincerely: you will be the right man in the right place." The happy official turned to Mr. Lynan "You don't seem to join in the congratulations Mr. Lynan," he remarked. "Never had any opinion of you" growled that gentleman without lifting his hand from his writing. "I beg your pardon, I scarcely caught what you said." "Never had any opinion of you" repeated Mr. Lynan in a louder growl. "Hugh! Hugh!" remonstrated Mr. Porter, but it was useless, the great official could only mutter something about candour and try to smile as he took his departure.

I have mentioned Mr. Porter as an orator. He was a very great one, and I may say the only man in South Africa to whom I have ever listened whose speaking deserved the name of oratory. One of his greatest admirers—a former Judge of the Supreme Court—asked me whether I had ever heard him matched at the English Bar. I suggested Sir ALEXANDER COCKBURN as a possible rival. "Ah," was the reply, "You may have heard COCKBURN make a speech equal to any of Porter's, but recollect for one constantly hearing the latter he is never dull, never tedious, and he is the only man I know who can argue a purely legal question with brilliant eloquence and clearest logical reasoning combined."

There may be a few among my hearers who remember Mr. Porter in 1864, when the Parliament sat in this City. If so they will hardly have forgotten two splendid speeches he made in the House of Assembly—the first, on introducing the Bill to create a "Supreme Court of the Eastern Districts," and after that was thrown out, a second one introducing another Bill to establish the present Court here. So completely did he appear to have exhausted the subject in his first address, that I looked forward to a mere repetition of its phrases and arguments in the second; but it was not so—all was new, fresh, logical and complete, and he carried his audience with him. It would be difficult to say which was the more brilliant effort of oratory.

Going on Circuit was a work of labour in the days to which I am referring. There was but one Circuit for the whole Colony, and it took quite three calendar months to complete its work. The

roads were, as a rule, bad and sometimes dangerous; the accommodation on them scanty and seldom attractive. Each barrister had his own cart and horses, though on a few rare occasions I have known two to travel together with four horses instead of the ordinary pair. On one occasion I was in the cart of another member of the bar—a light open dog-cart which my friend was driving. We were leaving this city for Fort Beaufort, and had taken what was then a new road. We had only gone a few yards along it when some workmen shouted to us that we could not pass that way. My friend went to turn his horses quickly, but in doing so let one rein slip out of his hands, the consequence being that the horses, which were very spirited, twisted round so sharply that the cart was capsized, and they ran away with it for some distance, bottom upwards. My friend, like myself, fell clear and we were only shaken a little; but I shall never forget a stout respectable looking man who had seen the accident rushing up to us and crying “Are you hurt?” When we replied “No” he seemed greatly relieved, and putting his hands to his sides he roared with laughter and ejaculated again and again “And a couple of lawyers too! A couple of lawyers, oh lor!” The joke of the thing struck him more than it did my friend or myself.

One of the greatest drawbacks to circuit travelling used to be the almost impossibility of getting one’s bath while on the road. Once I stopped at a farmer’s house, on approaching which I noticed a stream of water with a few tempting-looking pools here and there. I pointed them out to Mr. Fairbairn, the Judge’s Clerk, and we agreed to go and try the pools the next morning at sunrise. We found them wonderfully refreshing, but it appears the farmer had seen us, and the result was that he took the Judge aside and asked him whether Mr. Fairbairn and I were not slightly touched in the head; the idea of a sane man voluntarily putting himself into cold water appeared to him inconceivable.

Many of you will no doubt remember the late Sir SYDNEY BELL, who was for many years a Puisne Judge and afterwards Chief Justice of the Colony. A man who had his peculiarities, amongst which were two prominent ones—great kindness of heart, and a dislike of pomposity. A well-known old District Surgeon of the Paarl (now gathered to his fathers) was giving evidence as to the

injuries found on a man who had been badly assaulted. "Anything else?" asked the Attorney-General. "Well," said the Doctor, "there was a slight abrasion of the nasal epidermis." "Do you mean that the skin of his nose was scratched?" asked the Judge. "Yes, my lord." "Then why didn't you say so?" asked SIR SYDNEY, rather snappishly.

The same Judge was very keen in detecting and exposing false pretences. At a Worcester Circuit Court a Clerk of the Peace under the old system, appeared to argue a case before him, and had the audacity to quote Voet in the original Latin. The Judge at once saw that the man knew nothing of the language. "Give me the English of that," he said. "I beg your lordship's pardon?" stammered the would-be learned gentleman. "Give me the English of that," repeated the Judge. "I—I—I thought your lordship understood the Latin." "No I don't; *do you?*" The titter that ran round the Court was disconcerting and the Judge was charitable enough to let off the offender with only a glance of disgust.

Judge CLOETE was not only a good lawyer, but an excellent judge of horseflesh. He once had to cross the Gouritz River when it was swollen. A number of farmers had assembled on the opposite bank to meet him. Amongst them was an old Boer who was, as the Judge said, "*beetje lekker*," riding a stout but old-looking horse. The rider going up to the Judge said, "Now Judge, they say you know more about a horse than any one else: tell me how old this one is." The Judge saw at a glance that it would be useless to examine the animal's mouth: so, going up to its tail he began gravely parting the hairs of it, stopping now and then as if to make some further examination. At length he let go and said "I should say this horse is nineteen years old." "*Almachtig!*" exclaimed the farmer, "he is exactly nineteen; I bred him myself." Of course there was a crowd round the Judge to learn his secret, but he declined to divulge it. He had made a lucky guess, but there are Boers in the district who maintain to this day that Judge CLOETE could tell a horse's age from the hairs of its tail.

The same Judge used to tell a story of one of his experiences while Recorder of Natal. Some assault case had been heard in which a man named Murphy was a witness: a woman had been

called but could throw little light on the case as she admitted that she had been fast asleep while the disturbance was going on. The Judge, in the course of his address to the jury, remarked that there was not much to be made of this woman's evidence as she was evidently most of the time "in the arms of Morpheus." Up sprang the woman in the middle of the Court—"My lord, my lord, don't take away my *character*; I was never in Murphy's arms in my life!"

A kind and genial gentleman was Sir WILLIAM HODGES, but he was apt to be a little too lenient with sheepstealers. A prisoner stood an excellent chance of being let off with a mere nominal punishment if he pleaded that hunger had made him steal; for Sir WILLIAM was disposed to believe that most farmers half-starved their servants. A man who had stolen 30 sheep at once put forward this plea of hunger, but that was too strong even for Sir WILLIAM. Another, who had stolen a whole flock of 400 or 500 sheep, was asked how he came to take such a number. The Kafir's reply was "I wanted to start sheep-farming in my own country, because I heard that it paid so well." On Circuit with Sir WILLIAM was, on one occasion, the gentleman who is now himself Chief Justice, but was then a barrister. He is an admirable shot and one day he brought down a fine paauw. Knowing that he was going to stay at an hotel where the bird would go a very short way among the multitude of guests, he sent it as a present to Sir WILLIAM. They did not meet again until the Court had closed, and they were once more on the road. Sir WILLIAM came up—"I have to thank you for that paauw, De Villiers; it was a very fine bird indeed. But, I say, is it not out of season?" "Oh, but Sir WILLIAM, travellers are specially allowed by the Ordinance to shoot in or out of season." "Ah! yes; but doesn't that mean for their own consumption?" "Well, Sir WILLIAM," was the reply, "when I sent you that bird I thought, of course, you would invite me to dinner."

No more learned Judge has sat on the Cape Bench since I have been in the Colony than the late Mr. WATERMEYER. He was not merely a profound lawyer, but also a ripe scholar, a man of refined culture. He had one admirable quality in a Judge—perfect self-command. He was occasionally subject to severe

attacks of gout, but the pain never ruffled his temper. I remember in the old Circuit days seeing him come into Court here painfully hobbling on crutches. He sat all day as usual, and though paroxysms of agony passed over his face from time to time, no ill-tempered or hasty word once escaped him. If to preserve a suave and equable temper in the midst of gout-torture is not heroism, I know not what else to call it. I have never been favoured with a touch of it myself, but I fear the consequences of one would in my case be—I will say “shocking.” The Judge could be witty when he chose. I was with him in a snow storm once, outspanned on the top of a berg. Amongst the party was an attorney, long since deceased, who looked especially miserable from the cold. “Why, C.” said the Judge (C. was of Swiss descent), “this ought to remind you of your Native Alps. Besides, after all, this is *nix* (*nichts*).” If any ladies present don’t know Latin, perhaps the nearest gentleman will explain the pun.

Another Attorney, long since dead, who used to accompany us on Circuit was a very nervous man while travelling. At the time I am speaking of there were many rumours of approaching Kafir wars, and apprehensions were entertained that travellers might at any moment be attacked by a body of these natives. The gentleman to whom I am referring was in his cart with his driver when they came to a very big and very steep hill. So he made the boy get out and walk while he took the reins and let the horses creep up the ascent. The boy loitered some distance behind the cart, and suddenly began some unearthly screams and shouts. “Oh heaven! the Kafirs!” exclaimed the old gentleman, trembling, “Oh! protect me, oh!”—and here, being a good Catholic, he called on the Virgin and the Saints to intercede for him. At last the boy came up, looking perfectly happy and contented. “Is that you Tommy?” “Yes Master!” “What was all that horrible shouting then?” “I was only singing, baas.” “Why, you infernal young scoundrel what the — do you mean by frightening me like that.” It was the old story—the piety had vanished with the peril.

I don’t know whether barristers on Circuit have any trouble nowadays, in getting their fees paid. There used to be a little sometimes in days of yore; but I believe I can relate an

experience of one of the gentlemen now holding a seat on the Bench here. He had successfully defended a prisoner, and after the trial applied to the agent who had instructed him for his fee. The agent declared that he had done his best to get the money from his client, but had not yet succeeded and advised the Advocate to appeal to the man himself. This he did, and the reply he received was "What are you to get a fee for? The jury said as I aint guilty, didn't they? then why should I pay you?" If I have spoilt the anecdote the gentleman will forgive me.

Mistakes will sometimes happen in the Courts. I will give two instances. A prisoner named Jan was put into the dock charged with the crime of serious assault. The Registrar read the indictment setting forth that on such and such a day the prisoner did violently attack one Booi, and did beat him with a stick upon his head and other parts of his body &c. "How say you," asked the Registrar; "Are you guilty or not guilty?" "Nie Baas," said the prisoner, "I am not guilty. I am the man that stole Mr. Marais' horse." They had put the wrong "Jan" into the dock.

Another mistake arose from bad lighting of the Court, or bad copying of documents. It was late in the evening at a Circuit Court when Mr. B., the prosecuting Counsel, rose to examine a witness:—

"Your name is James Smith?"—"Yes."

"You live at Groschens' Kop."

"No, I don't."

"Well you *did* live there, then?"

"No, I didn't."

"Take care, sir, what you are about. There is such a thing as perjury: and I may have to ask his lordship to commit you for that offence. I ask you again. Did you *never* live at Groschens' Kop?"

"Never."

"Then, sir, what do you mean by telling the Magistrate that you *did*?" and here the learned Counsel held up a copy of the depositions made in the Magistrate's Court, and glared at the witness.

"Mr. B." said the learned Judge who was presiding. "I have the preliminary examinations before me, and I find that the witness did not say 'I live at Groschens' Kop,' but '*I keep a grocer's shop.*'"

Mr. B. subsided, while the audience laughed.

I fear by this time I shall have worn out your patience with my trivialities; so I shall draw to a conclusion with one little judicial experience of my own. I was at the Capetown railway station preparing to start for Wynberg, when a respectably dressed man came sidling up to me. Touching his hat he said, "I beg pardon, Sir, but you don't seem to remember me?" "I really do not," I replied, "Where did I ever see you before?" "At Kimberley, Sir." "Indeed: What had I to do with you there?" "You sentenced me to prison, Sir." "What for?" In a deep whisper the answer was given "I.D.B.!" "How long did I give you?" "Three years, Sir." "*Only three years?*" I exclaimed. "Oh, Sir, that's just it. I expected to get seven, and you only gave me three. When I got back to prison I *should* have liked to drink your health, Sir." "I suppose I did not know what a scoundrel you were," was my ungracious reply. I believe this is the only man who was ever grateful to me for sending him to prison, and I am sure is the only one who has ever claimed my friendship on that ground.

DECISIONS UNDER THE TRANSVAAL GOLD LAW.

In the difficulty of obtaining a collection of the decisions of the Transvaal Court—a difficulty which is only equalled by that which existed a few months previously of obtaining access to the local laws, it has struck the writer of this article that a few notes of the chief decisions on the Gold Law of 1885, published in the *Law Journal* of April, 1887, would be useful to legal practitioners, both inside and outside the bounds of the Transvaal. I must, however, warn my readers not to expect a systematic exposition of the principles of the Law, such exposition of principles as contained, for instance, in Mr. Sampson's admirable "Short Studies," that have appeared in this Journal. In the few decisions on the Transvaal Gold Law, the materials for studies of such a nature do not as yet exist. In fact the impression left on my readers will be of the "nakedness of the land," the absence of any authorita-

tive guide in the interpretation of a law that is not one of the most specific or systematic.

The most important decision under the Transvaal Gold Law was that given on March 2, 1887, in the case of *Moolman and Coetzee v. Schaffe and Drury*, which decided that under the Gold Law of 1885 the right to a claim lapsed on the expiry of the licence through non-payment of the licence moneys, and that the ground on which the claim had subsisted could be taken out as a claim by a third party. No written judgment was given in the case; but the ground on which the decision rested was that the law recognized no such thing as an unlicensed digger, and that therefore the claim-holder, whose licence had expired, had no possible right to the ground. It was argued on the other side that the claim-holder was in the position of a lessee holding on after his lease had expired, who could not be expelled from the premises he occupied without legal process; but, as was pointed out by the Counsel for the appellants (the case being an appeal from the Diggers' Committee) even if the analogy held good, and a licence gave any other right than to perform a series of acts (*cf.* Bainbridge's Law of Mines, Minerals, 4 ed., p. 510-3), the pegging out by the appellants on the land forming the respondents' original claims, and the subsequent action for ejectment of the respondents, corresponded with the legal process for the ejectment of a lessee, whose term had expired. The case is, however, more of historical than practical interest, as with that facility in legislation that distinguishes the Transvaal, a resolution of the Executive Council was immediately passed in accordance with special legislative powers granted by the Volksraad to the Executive Council, by which it was provided that claim-holders whose licences had expired should have fourteen days from such expiry to renew their licences, subject to a heavy fine. This resolution was succeeded by Clause 61 b. of the amendment of the Gold Law passed by the Volksraad on August 10, 1887, which expressly lays down that claims for which the licences have expired shall not be occupied or (to use a somewhat undignified phrase which has established itself in this country) pegged out by another person. The original holder has 21 days given him to renew his licence on payment of a fine of 2/6 per day for the days he

is in default, and after that period the claim lapses to the Government which is instructed to sell the same. The latter provision is a step in the direction of that security for tenure, which is so essential for the welfare of the Gold Fields, but which, with certain cases still undecided, cannot be said to exist in full.

The case next in importance to the one I have just discussed is that of *Kraft v. Bok, N.O. and the Witwatersrand Gold Mining Company*, judgment in which was given on June 20, 1887. The question in that case was whether the lessee of the mineral rights on a farm obtained thereby the right that would otherwise, under Clause 15 of the Gold Law, belong to the owner, of receiving the half of the moneys paid to the Government for prospecting and digging licences on such farm after it had been proclaimed a public gold field under Clause 10 of the Gold Law. The plaintiff in the case, who was the owner of the farm Driefontein, had before the proclamation of the farm, entered upon a contract with H. W. Struben, by which the former leased to the latter "all the mineral rights of whatever sort accruing to the first undersigned (Kraft) as owner" of the farm; and the action arose through Kraft's claiming from the Government the half of the licence-moneys paid to Government for claims taken out on the farm after it was proclaimed, which moneys the Government had been proceeding to pay to the Witwatersrand Gold Mining Company, as cessionary from H. W. Struber of the lease. The decision of the Court was that the owner of the farm, the plaintiff, was entitled to the half of the licence-moneys, as the right to receive such moneys was not a right to minerals, and was therefore not included under the words "all the mineral rights of whatever sort accruing to the first undersigned (the lessor) as owner" of the farm used to describe the rights passing to the lessee.

The decision caused some surprise at the time, it having been generally assumed that the lessees or cessionaries of mineral rights took the place of the owner or lessor, when the farm was proclaimed, and thus as compensation for the limitations imposed by the Gold Law upon the exercise of the right to work the minerals, obtained all the advantages accruing to the owner of a proclaimed farm under the Gold Law, with the exception perhaps of licence-moneys for stands. The judgment, would, however, appear

to have been in accordance with the intentions of the legislators, as the following provision was added to Clause 15 in the revision of the Gold Law that took place in 1877, "the accounts for all such moneys (*i. e.* from licences and stands) shall always be made out in the name of the owner, and the moneys, *even in the case of lease*, be only paid out to the owner or his agent." The result of the above case shows the necessity for care in the drawing of leases or other agreements connected with the disposal over mineral rights, such documents, as I shall afterwards show, being exposed to danger from another quarter. The salutary practice of taking skilled legal advice on important documents, besides that of the attorney or notary drawing up the document might with advantage be more frequently adopted in the Transvaal, where the public entertains somewhat misty views of the functions of the various classes of practitioners.

Among decisions upon the Gold Law of minor importance may be mentioned that in the case *Du Preez and others v. Meijer and v. d. Walt*, which was heard before Mr. Justice JORISSEN alone and judgment in which was given on February 23, 1887. In that case it was laid down that under the Gold Law the lessee of a farm on an ordinary, *i. e.* an agricultural lease, obtains no rights as regards the precious metals or taking out claims, though the owner cannot exercise his mining rights to the prejudice of the lessee in the enjoyment of his rights under the lease. The same case also decided that it is not necessary to make the Government a party to an action for setting aside a *mijnpacht* or mining-right lease, *i. e.* an agreement by which the Government gives the proprietor of a farm or the lessee or grantee of its mineral rights the right to mine for precious metals on a whole or portion of the farm, I may also refer to the case of *Steijn v. Johnson and the Diggers' Committee of Witwatersrand*, which was before the Court on November 11, 1887, a case which touched an important point, *viz.*, the nature of water-rights granted by the Diggers' Committee, but did not decide anything on the point. An application was made by Steijn as owner of a farm to set aside a grant of a water-right on his farm by the Diggers' Committee on the ground that it had been granted contrary to the Gold Law. The Judge refused to decide the

matter on affidavits, but giving the owner the advantage of being regarded as in possession, decided that the digger who had obtained the grant of the right from the Diggers' Committee must make good his right by action. The action has not, however, been as yet instituted. Considering the number of Companies possessing water-rights on grants of Diggers' Committees, it is a question of importance what are the legal properties and nature of such grants.

The most recent decision under the Gold Law was that given by the full Bench on January 13, 1888, in the case *The Madeline Reef Syndicate v. Coetzee and twenty others*. This was an action for the ejectment of the defendant from 21 claims which they had pegged off on ground amalgamated and registered as Blocks Nos. 2 and 3 of the Madeline Reef Syndicate. The defendants' contention was that such amalgamation and registration was illegal, and that the alleged blocks of claims, Nos. 2 & 3, were open ground. It appeared that one Johnson, from whom the plaintiff syndicate derived its title, had pegged off 36 claims in the names of 36 persons for whom he held powers of attorney. He had then proceeded to the office of the Mining Commissioner for the North Kaap, and, in accordance with the instructions of the latter, had taken out twelve diggers' licences in the names of twelve of the persons whom he represented, and amalgamated and registered twelve of the 36 claims in the names of those persons. He then, proceeding on the assumption that these 12 names were free, took out other 12 licences in the same names, and amalgamated and registered other 12 claims in these names, although of course this second block had been originally pegged off in other names; he proceeded in the same way with the third block. The Court, considering it inequitable that the Syndicate should suffer by the mistake of the Mining Commissioner, as against third parties with full knowledge of the facts, seems to have regarded the plaintiff syndicate as being in the same position as if the Mining Commissioner had actually amalgamated and registered the claims in the 36 names, and on the 36 powers of attorney on which they were pegged out, and to have asked what would then have been the position of the plaintiff syndicate in that case. At the time the 36 claims were pegged off the persons in whose

names they were pegged off held no diggers' licences. Johnson had, it was true, a prospecting licence, and held three blocks of land as prospecting areas in accordance with a grant of the Gold Commissioner (who at that time put a liberal construction on the Gold Law). It did not, however, appear that the 36 persons in whose names he pegged off had licences of any sort. To exhibit the view taken by the Court on this point, I will translate a portion of the judgment of the Chief Justice:—"Now it has appeared that the Syndicate, whose representative according to the finding of my brothers possessed three prospecting areas, pegged off 36 diggers' claims in 36 names, and that everything was done in due order with the single exception that as yet no diggers' licences had been taken out until the day following the pegging off and on the amalgamation; and thus the further question arises whether one *must* first have a digger's licence before one can beacon or peg off a claim. I have examined the Gold Law, and, although I find that one cannot, without a licence, work a claim or continue in possession of it or jump it, I read nowhere that one, for instance, as a prospector *must* first take out a digger's licence before one pegs off a claim. One naturally pegs off a claim first, and then takes out a licence. Although, perhaps, as against others who have taken out a licence first, the claim would be forfeited, yet by pegging off a claim with the object of immediately thereupon taking out a licence, one does nothing that is inconsistent with the Gold Law."

In order to prevent cases of this sort—and a similar case is pending with regard to a portion of the Republic Company's property—it would be desirable to have a short period of prescription laid down by law which should cure defects in the original titles to claims.

The Volksraad Resolution of August 12, 1886, to the effect that all agreements *as to the cession (omtrent den afstand)* of rights to minerals shall be void, unless notarially drawn and registered in the Deeds Office is generally given as an appendix to editions of the Gold Law, and promises to be fruitful in litigation. The object of passing the resolution seems to have been to protect the unwary farmer, by giving him a *locus penitentiae* before he finally parted with what might be valuable rights, viz., by depriving any

agreement he had made of any validity until certain solemn forms had been gone through. As yet no case has been decided on the resolution itself; but the case of *Taylor & Claridges v. Van Jaarsveld & Nellmapius*, judgment in which was given on February 26, 1887, has a certain bearing on the interpretation of the resolution. In that case the plaintiff sued for specific performance of a verbal contract by which the first defendant bound himself to give plaintiff the exclusive right of prospecting for six months, with the right if they found payable minerals to take out a lease of the mining rights of the farm, which subsequent lease was to be executed according to law. It was argued for the defendants that this verbal contract was void in virtue of Clause 14, of Law No. 7, 1883 (upon transfer dues) which states that "No cession of a right to minerals, assumed to be present or actually present on a farm shall be valid, unless embodied in a notarial document and duly registered in the office of the Registrar of Deeds," and goes on to enact that transfer dues must be paid, such cessions specially referring to leases. The Court decided that the contract of the first defendant was not a cession or lease, but merely gave the option of taking a lease at a future time; and therefore did not require to be notarially drawn and registered. Whether the contract could be described as *an agreement as to* the cession of mineral rights and therefore included in the words of the Volksraad resolution of August 12, 1886, was expressly left an open question by the Court, the contract being prior to the date of such resolution.

The Volksraad resolution of August 12, 1886, has led to a curious state of things. Numberless contracts have been recently made with the owners of farms generally securing the right to prospect on the farm for a certain period, and giving the option of taking out a lease of the mineral rights of the owner. Such contracts have generally been notarially drawn, and to comply with the terms of the resolution, they have often been tendered for registration. But here arose a difficulty. The Registrar of Deeds refused to register contracts as to mining which did not contain an out and out cession or an out and out lease of mineral rights. It does not seem to have occurred to many practitioners, who apparently regarded the Deeds' Office as constituting an

imperium in imperio to compel the Registrar by a *mandamus* to register such contracts, and most of the contracts have therefore been merely notarially drawn. Thus many speculators, who have been fondly dreaming of rights secured over farms by notarial contracts, may find themselves rudely awakened, if the High Court should put that interpretation on the Volksraad resolution, which the legislators themselves probably intended, viz., that agreements, giving even the option of taking out a lease of mining rights, should be void without certain formalities.

GEORGE T. MORICE,
Transvaal.

EVIDENCE BY PRISONERS IN CRIMINAL CASES.

In the first volume of the *Cape Law Journal*, will be found (p. 137) an article upon the "Evidence of Prisoners," and, in the same volume (p. 325) there is a shorter article upon the subject of "Oaths." The former of these two papers was founded upon the proceedings at a very important trial in London, for murder, in which Sir Charles Russell, Q.C., who was Counsel for the prisoner, put before the Court, after the then Attorney General had objected but withdrawn his objection upon grounds of convenience, the instructions he had received from the prisoner's Attorney, setting forth the prisoner's account of the transactions which were the subject of the trial. The question of Counsel's right to adopt the course as above stated then became the subject of correspondence between the Lord Chief Justice of England, and the Attorney General, and from the correspondence it was established that such a proceeding was "contrary to the administration and practice of Criminal Law, as hitherto allowed." The writer of the article on "Evidence of Prisoners," then proceeds to advance weighty arguments in favour of the admission of a prisoner's sworn testimony at his trial in his own defence, provided the prisoner should desire to tender his testimony, the writer adding: "And in every case, civil or criminal, the evidence of all persons should be admitted for what it is worth." The hope expressed by "Delta," the writer of the article mentioned, that the Parliament of this

Colony would introduce a measure enabling prisoners to give evidence has since been realised and, for about a year past it has been competent for prisoners, and for the wife or husband of a prisoner, to give sworn testimony in a criminal trial, under the provisions of Act 13, 1886. We have already expressed an opinion upon the Act in these pages (Vol. III., 218) and some experience of the working of the new law has tended to confirm the opinion then expressed, somewhat sweeping it is true, that the Act was "clumsy, vague, and uncertain."

First of all, the Act (13, 1886) bears the title of an "Act to amend in certain respects the Criminal Law and the Law of Evidence." It then deals with the Police Offences Act, 1882, it makes the injuring of any person by negligent driving a crime punishable with fine and imprisonment, it amends the "Ostrich Feathers and Skins Thefts Repression Act, 1883," and sections 6., and 7, deal with the admission of an accused person and of the wife or husband of the accused, as a witness in a criminal proceeding against such person, "if such person thinks fit." Section 7, is as follows:—"No witness who shall be examined or cross-examined in any proceeding under the last preceding section shall be excused from answering any question relevant to the issue in such proceeding on the ground that the answer thereto may criminate or tend to criminate himself." Under this last section some difficulty has been already met with as to precisely how an accused person giving evidence on his own behalf should be treated. The old leaning in favour of "the prisoner" evidently still survives, and there is some reason for hesitation when we regard the apparent insufficiency of, say, section 7. The following questions arise: What is a question "relevant to the issue" as intended by section 7? Is the character and past history of the prisoner with, perhaps, a string of previous convictions, "relevant to the issue" as it would be in the case of any other witness before a Court of Justice. The Judges hesitate to allow cross-examination of prisoners as to previous convictions. One learned Judge of the Eastern Districts' Court has actually ruled that such a cross-examination is inadmissible having regard to section 19 of Act 3, of 1861, which excludes proof of previous convictions unless evidence of good character be called on behalf of a prisoner.

It can hardly be doubted that in permitting a prisoner to give evidence on his own behalf the Legislature intended that he should be liable to exactly the same sort of treatment to which an ordinary witness is subject, but [the Legislature has not said so, and therefore we have the anomaly of a prisoner under trial being sworn as a witness and at the same time protected from the exposure of his real character like another person not a prisoner. Then again with regard to the penalties of his oath. A prisoner undergoing his trial would be something less than human if he were to resist a temptation to commit a moderate amount of perjury in order that he should escape. But up to the present there has not been any prosecution of a convict for perjury committed on behalf of himself at his trial. Besides it is perfectly clear that no law officer would care if he could possibly avoid doing so, to institute proceedings against a prisoner already, perhaps, heavily sentenced for swearing what he knew to be false in order to escape justice. There is thus an additional protection to a prisoner sworn as his own witness, and at the same time such sanctity as may yet be supposed to attach to an "oath" is rudely violated, and the offence of perjury almost actively encouraged.

To consider the case of a prisoner on his trial for murder.

A prisoner on his trial for murder is in the same position, as regards being permitted to give evidence as any other accused. The Act does not except prisoners under trial for murder. But on his trial for murder the man would, according to the principle of the law which recognises and excuses some acts of a man desperate, struggling for life, be abundantly justified in swearing falsely in his own defence. "Delta," whose article is above referred to, argued that nearly every prisoner would give evidence under the then proposed Act, because of the adverse commentary which his silence would constitute. But assuming that a prisoner being tried for murder should appear in the witness box and there commit "wilful and corrupt perjury," would anyone suggest that decency would admit of the execution of sentence being respited in order that a trial for perjury should follow and the consequent sentence be first served? It is true that a prisoner's silence has already come to be used against him, as when a Judge points out to a Jury that "the prisoner might have been sworn before

you as a witness had he so chosen, you have therefore only the case for the Crown to decide upon," or words to that effect. The fact of a prisoner, on his trial for murder having kept out of the witness box was, not long since, mentioned, in fair terms enough, but words which might lead the jury to think that the prisoner ought to have been a witness on his own behalf, by a learned Judge. It may be that prisoners on their trial for murder ought not to be regarded with any special leniency but, at the same time, there is something repugnant to the general sense in any *onus*, however slight, being cast upon a prisoner under trial for his life. For these reasons we are inclined to adhere to the opinion, formerly expressed, that the Act is "vague and uncertain."

Section 8 of the Act provides that a Magistrate at any preparatory examination may call upon the accused to admit or deny the fact of his having been previously convicted; "and if the prisoner shall admit that he was so previously convicted, his admission shall be reduced to writing and subscribed by him and also by the Magistrate; and any such written admission purporting to be so made and subscribed shall be received in evidence as proof of such previous conviction before any Court or tribunal upon its mere production, unless it shall be proved that such admission was not in fact duly made."

Upon this Section the Judge-President has already laid down that the notice that proof of a previous conviction will be used at a trial as required by Act 3, 1861, is still necessary no reference having been made to the law requiring notice in the new Act. Upon the whole matter there can be little doubt but that recent legislation upon these very important principles has not been of so careful and complete a character as it ought to be. We have before condemned the passing of Composite Acts of Parliament such as to a hideous degree, Act 13, of 1886 undoubtedly is. It is on a par with the Act which really intended to abolish an Appeal Court (Act 17, 1886) bears the title of an "Act to amend the law relating to Appeals and the Duties of the Sheriff, and to make more convenient provision regarding Legal Process in certain cases," or the Act (14) of last Session which, expressly directed to the removal of numbers of voters from the Register is, never-

theless, placed upon the Statute roll as an Act to "Make better Provision for the Registration of persons entitled to the Electoral Franchise under the Constitution Ordinance." With regard to the Act 13 of 1886 some of the defects here pointed out may, unless they are remedied in good time lead to serious inconvenience the first time that a trial of more than ordinary public concern takes place. The swearing of witnesses at all, in the present form, is, we think an antiquated and formal ceremony of but little binding effect upon such consciences as many witnesses possess. To say that the old form of oath is calculated to influence a prisoner struggling for liberty, or, it may be, for dear life itself, in the most minute degree in the direction of veracity would be an insult to the most average of understandings. It is to be hoped that the whole question may at no distant date be more effectually taken in hand, and dealt with, by the Legislature.

REVIEWS.

FOORD'S REPORTS.*

We have before us the first, and unfortunately the last, volume of the late Mr. Foord's Reports of Cases decided in the Supreme Court from January to August, 1880. This volume was intended to fill up the hiatus existing between the Reports of Mr. Justice E. J. BUCHANAN which terminate in 1879, and those of Mr. Juta which commence in September, 1880, and can compare favourably with both the one and the other of these sets of reports, both for the importance and value of the cases decided, and for the manner in which the work has been done. The only fault we have to find with the work, a fault no doubt unavoidable under the circumstances in which it was compiled, is that it hardly does justice to the arguments of Counsel. But, with this one exception, it forms a most valuable addition to our decided cases.

* Cases decided in the Supreme Court of the Cape of Good Hope during the year 1880 (Jan. to Aug.) with table of cases &c. Edited by A. J. Foord, B.A., LL.B.) (Cantab); of the Inner Temple, Barrister-at-Law, and Advocate of the Supreme Court of the Cape Colony. Capetown: J. C. Juta & Co., 1887.

The case of *Merriman v. Williams* takes up a large, but, when we consider the importance of the interests involved, perhaps not undue share of the volume. Among the other cases reported, the most important are those of the *Executors of Meyer v. Gericke*, *De Vries v. Alexander*, *Lange and others v. Liesching*, *Malan and Van der Merwe v. Secretan*, *Boon & Co.*, and *Raubenheimer v. Executors of Van Breda*. The first of these lays down the rule, hitherto very doubtful and undecided, as to the time when the *litis contestatio* is supposed to take place according to our law and practice, a question of such great importance in actions for damages based on delicts, the rule being to the effect that "in the Supreme Court the *litis contestatio* in an ordinary defended suit may be considered to take place as soon as the record is completed by the joinder of issue between the parties."

De Vries v. Alexander has been adversely commented upon in the case of *Eckhart v. Nolte* (3 *Cape Law Journal*, 43) by the Chief Justice of the Transvaal, who held that there was no difference between *prædia rustica* and *prædia urbana* as to the right of the lessee to sublet without the consent of the lessor, which position has been fully discussed in this Journal (Vol. III, pp. 93 and 165). But the rule laid down by the Supreme Court in the case of *De Vries v. Alexander*, that lessees of urban tenements may sublet without the consent of their landlords, but lessees of rural tenements may not, has now become firmly established in this Colony by a series of decisions, the last being that of *Green v. Griffiths*, 4 *Juta*, 350.

In *Lange and others v. Liesching and others* (p. 337) it was decided that a public sale of insolvent's property by his trustee is a judicial sale or sale *ex decreto judicis*, and that where, with the knowledge of the fidei-commissaries who did not protest, a trustee of an insolvent estate has publicly sold property of which the insolvent was only the fiduciary proprietor, and has transferred the same to the purchaser, the title of the purchaser is good and cannot afterwards be attacked by the fidei-commissaries.

The judgment of the Chief Justice in the case of *Malan and another v. Secretan*, *Boon & Co.* (p. 94) is a valuable contribution to the discussion of the subject of *causa* and *consideration*, which has lately been treated in this magazine by Mr. H. F. Blaine

(Vol. III, p. 53 ; vol. IV, 99, 149) and by the Chief Justice of the Transvaal in a note to his translation of Van Leeuwen's Roman Dutch Law, and the conclusion comes to by DE VILLIERS, C.J., is that "the notion that this *just cause* is to all intents and purposes the same as the *consideration* of the English law is so firmly established in the law of the Colony that it is too late, even if it were wise, to eliminate it."

The case of *Raubenheimer v. Executors of Van Breda* is an important decision upon the law of representation in a case of succession *ab intestato* by collaterals, but we call attention to it here more for the purpose of pointing out a very curious mistake in constitutional law and Netherland history which the Chief Justice has fallen into a mistake which is all the more unintelligible seeing that it was made while correcting what we cannot help thinking was a mere *lapsus lingue* committed by Counsel (*Brand and Ebdon*) in the case of *Spies v. Spies*, 2 Menzies, 455, but what the Chief Justice seems to have considered the result or the cause of a "wide-spread misapprehension that the North Holland law of succession prevails in this Colony." In attempting to remove this wide-spread misapprehension the Chief Justice is reported to have said:—"The Political Ordinance of 1580 on the face of it shows that it was not intended to be confined to North Holland, *but was intended to apply to all the provinces over which the States-General then exercised powers of legislation.*" Now this is clearly a case of Homer being caught nodding.

The mistakes that are so frequently seen in English works on the subject of the Netherlands are due to the very loose way in which the term Holland has come to be used in English, owing no doubt to the predominance of the one Province of Holland in the Confederation of the Netherlands, especially in the time of Barneveld and De Witt; for, unless it is at all times kept in view that Holland was only one of many provinces, which in the time of Charles V. of Spain attained to the number of seventeen, it is impossible to understand either the history or the legislation of the Netherlands. The Province of Holland consisting of North and South Holland and West Friesland, had its origin in the Countship of Holland, which had acquired West Friesland by conquest and had had South Holland incorporated with it in 1283,

when the Count of Holland, who had previously held South Holland as a fief of the Duke of Brabant, was released from homage for the same. It must not, however, be supposed that because these different territories happened to be under one Count they were at the same time subject to one system of law. Leaving to one side for the present the great division of the Countship into the lands subject to the Frankish or Schependoms law and the Frisian or Aasdoms law, (a division which extends throughout the whole of the Netherlands, and which is an indication as to how far the occupation of the Franks extended), it is hardly any exaggeration to say that every town, and almost every village, had peculiar customs and laws of its own, which could not be interfered with by the central government. A similar diversity of laws and customs was also to be found throughout Zealand and the other Provinces, with this exception that Friesland fell wholly under the Schependoms or Frankish laws.

Each Province had a legislature of its own, which consisted of *deputies*, rather than *representatives*, of the nobles and larger towns, inasmuch as the majority could not bind the minority, but each vote could only bind its own constituents. Towards the end of the 14th Century these legislative assemblies began to be called the States or Estates of the Province. Philip, the Good, of Burgundy, was the first sovereign of the Netherlands who (in addition to other reforms, such as the creation of the Court of Holland and of a Supreme Court of Appeal for all the Provinces, called the Secret or Great Council) called into existence a central legislature for all his dominions, called the States-General and consisting of deputies from the different Provinces. In the States-General the same rule of voting prevailed as in the States Provincial, namely, that the majority could not bind the minority, but the deputies from each Province could only bind their own Province. It is self-evident that such a very singular political organisation would not be able to stand the test of troublous times, but must inevitably lead to dissensions and conflicts between the States-General and the separate Provinces. Such a conflict actually arose in later times, and was only settled by arbitrary violence; but at the time of which we are treating there was as yet no question as to the perfect independence of the Provincial legis-

latures, though arbitrary sovereigns may at times have made use of the States-General to register their arbitrary decrees, and the principle of Provincial independence was fully recognised by the Union of Utrecht, which was signed on Jan. 23, 1579.

It will be remembered that in the years 1580 and 1594 the Netherlands were in a state of transition. The Provinces, headed by the two Provinces of Holland and Zealand, had practically been in revolt against their lawful sovereign Philip II. of Spain since 1565. As the revolt progressed the necessity of a closer written union between Provinces of so many different nationalities gradually shewed itself, with the result that on Nov. 8, 1576, the Pacification of Ghent was signed by the Prince of Orange and the Provinces of Holland and Zealand on the one side, and the Provinces of Brabant, Flanders, Artois, Hainault, Namur, Utrecht and Mechlin and some few more of the towns of the Southern Netherlands on the other, having for its main object the expulsion of the Spanish troops out of the Netherlands, leaving the subject of religion an open question to be agreed upon afterwards. This Pacification was later on in the same year joined by the Provinces of Friesland and Groningen, and by a portion of the Province of Overijssel, and in Jan. 1577, the Union of Brussels was entered into with the view of safeguarding the religious interests of the Roman Catholic party and confirming the Pacification of Ghent. A more definite and closer union between the Northern Provinces being thought desirable, in consequence of several of the Southern Provinces of the Netherlands having been induced by Alexander of Parma to return to their allegiance to Philip II of Spain, the Union of Utrecht was signed on the 23rd of January, 1572. Owing to the unsettled condition of the times, it would be difficult to state, without the necessary books of reference, what particular Provinces were included in the Union at any particular date. All we can say here is that the original signatories to the Union were Gelderland, Holland, Zealand, Utrecht, and Friesland, that Overijssel joined it in 1591 and Groningen in 1594, and that different portions of the Southern Netherlands joined it from time to time.

The principal provisions of this Union were that the contracting Provinces agreed to remain eternally united as if they were

but one Province, in such a manner, however, that each Province should retain its privileges, liberties, laudable and traditionary customs and other laws; that the cities, corporations and inhabitants of every Province were to be guaranteed as to their ancient customs; and that disputes concerning these various statutes and customs were to be decided by the usual tribunals, by "good men," or by amicable compromise.

This, then, is the state of circumstances to which the remarks of the Chief Justice in the case of *Raubenheimer v. Executors of Van Breda* quoted above apply, when he says that "the Political Ordinance of 1580 on the face of it shows that it was not intended to be confined to North Holland, but was intended to apply to all the provinces over which the States-General then exercised powers of legislation." Now, the Provinces which, up to April, 1580, had signed the Union of Utrecht were, as we have stated, Holland, Zealand, Utrecht, Gelderland, and Friesland. Does the Chief Justice mean to say that the Ordinance of April 1, 1580, fixed the law of succession for all these Provinces? As we have already stated, it would have been wholly beyond the powers of the States-General at any time, without the consent of the deputies of a particular Province, to have altered the law of succession in that Province, and no such legislation would have been attempted by the States-General except at the arbitrary command of a sovereign despot. But when we look at the text of the Union of Utrecht it will be seen that the term *powers of legislation* when applied to the States-General is more or less a misnomer—the States-General had merely, with respect to each Province, the power of registering the resolutions come to by the States of that Province, and would not therefore, at any rate at that period of history, have ventured upon such arbitrary legislation as an interference with the law of succession in each Province, without its consent, would amount to, especially when, as the Chief Justice himself states, complaints were made by the inhabitants of certain parts of Holland, that the Ordinance in question was opposed to their ancient customs.

If there had been any attempt at such legislation on the part of the States-General, we make bold to say that it would have been simply ignored. It is not, however, likely that the States-General,

having before them the text of the Union of Utrecht with the ink on it hardly dry, would have attempted anything of the kind, and as a matter of fact they did not, as will sufficiently appear from the documents themselves. The Ordinance of April 1, 1580 (see Gr. Pl. Bk., vol. 1, p. 330), on the face of it shows that it was an Ordinance of the Province of Holland alone, and that it was enacted by "the Knighthood, Nobles, and Towns of Holland as representing the Estates of the said territory," after "consultation with, and with the advice of, the superior or presiding and other tribunals (*raden*) of Holland, Zealand and Friesland," the object of consulting the Courts of Zealand and Friesland being to get the advice of the best lawyers who administered the Schependoms law pure and simple on the one hand, and the Aasdoms law on the other. The Interpretation of May 13, 1594, was issued by the States of *Holland and West Friesland*, which latter term was merely synonymous with the term *Holland*. We have done enough we think, to show that the Chief Justice was in error as to the History and Constitutional law of the Netherlands; but if any further authority were necessary besides the text of the Ordinances themselves, and the territorial knowledge essential to the proper understanding of them, we may refer to Van der Vorm's *Versterfrecht*. From this it will clearly appear that the law of Zealand with respect to succession *ab intestato* was merely the customary law of the Franks, and was never reduced to a written legislative enactment, but agreed in the main with the new law of South Holland embodied in the Ordinance of April 1, 1580; and that the other Provinces, and numbers of individual towns and districts, retained a law of succession of their own.

The criticism which we have given is only of historical importance and does not affect the accuracy of the conclusion of law arrived at by the Court, but we have ourselves at times experienced so much difficulty in our studies through the loose views of legal writers on historical subjects, that we have felt it our duty to prevent any mischief in that direction where we are in a position to do so. This occasion has suggested to us the question whether a knowledge of Netherland History ought not to be made a compulsory subject for the University law examinations in this Colony, but this is too large a question to be entered upon here.

CAPE OF GOOD HOPE STATUTES, 1652-1886.

VOL. III.*

This, the third volume of the new edition of the Cape of Good Hope Statutes, consists of a chronological table and index. The first two parts were reviewed in the last volume of the *Cape Law Journal* at the times of their publication. The review of the first volume, while according to the compilers of the work full praise for the thought and labour bestowed, expressed dissatisfaction and disappointment at the paucity of alphabetical headings, and the glaring omission from the list of headings of several prominent and important subjects. In the notice of the second volume in the *Cape Law Journal* anxiety was expressed for the speedy appearance of this the concluding part, and now that it has arrived, we are glad to be able to say that all anxiety on the ground of probable shortcomings has been dispelled. It has completely fulfilled the highest anticipations which we had formed of it. Indeed, it has proved itself even better than we dared to expect.

The first part is taken up with a chronological table of the various Placaats, Proclamations, Ordinances, and Acts of Parliament. Reference is given in this table to the page on which the particular Statute is to be found in the preceding volumes of the work; and in another column of the table full information as to whether the Statute has been repealed, disallowed, or the like, is given. We have merely to refer to the form of this table in order to at once display its great practical utility. The defect in the two preceding volumes to which we called special attention, namely, the insufficiency of the headings, is in the third volume conspicuous by its absence. The index is full and satisfactory, and in a very large measure makes up for the deficiencies of the preceding parts of the work.

In order to corroborate this statement, it will only be necessary to refer to one subject included in the index. Matters relating to

* *Statutes of the Cape of Good Hope, 1652—1886.* Edited by Joseph Foster, Secretary to the Law Department; Hercules Tennant, Barrister at Law; and E. M. Jackson, Chief Clerk in the Master's Office. Vol. III., (Chronological Table and Index.) Capetown: W. A. Richards & Sons. 1887.

insolvency generally take up four pages, but are distributed under three headings, thus, Insolvency, Insolvent, and Insolvent Estate, instead of being grouped under one generic term. This is eminently satisfactory. By many it may be thought that the course pursued by the compilers in this instance was the most obvious one. But the condensation displayed in the earlier volumes made us fear that similar tactics would be adopted in the index. That such is not the case, we consider a distinct reason for congratulation.

As we have no serious criticism to offer on this work, we will conclude by commending it to the attention of those whose business requires them to consult the Statutes, and also by congratulating the compilers on the satisfactory conclusion of their labours.

THE LAW QUARTERLY REVIEW.*

This review, which commenced its career in January, 1885, has completed its third volume. Although it had a rival of many years standing, it took—from its very commencement—the leading place in English legal magazines, indeed we may say of legal magazines of the world. Its articles are well chosen and ably written; its reviews are marked by independence and thoroughness; and its notes upon current legal topics and cases are extremely interesting, as particularly evidenced by their being so frequently taken over by other legal periodicals. We have, ourselves, more than once taken over notes appearing in the *Law Quarterly*, we have made no apology for doing so, and no doubt those of our readers who have perused them have thought them well worthy of reproduction.

It would be invidious to select any particular article in the volume before us for special comment, as they are all good. We shall content ourselves with recommending this work to our readers as being well worth a place in the shelves of any legal library, whether in England or the Colonies. And we would draw

**The Law Quarterly Review*.—Vol. III. Edited by Frederick Pollock, M.A., LL.D., Corpus Professor of Jurisprudence in the University of Oxford and London: Stevens & Sons, 1887.

their attention to a special merit it possesses—a merit possessed by very few legal works—its price is so low as to be within the reach of nearly all who make law their profession or their study.

Van Leeuwen's Commentaries on Roman-Dutch Law, translated from the original by J. G. KOTZE, LL.B., Chief Justice of the Transvaal. In two volumes. London: Stevens & Haynes. We regret having to hold over the review of this work for the next number of this Journal.

OBITUARY.

WILLIAM WILSON PALEY, Esq.

The death of Mr. Attorney Paley, at the age of 37, which occurred at Kimberley, on the 4th of last October, was much regretted by those, and they were many, to whom he was known. The deceased gentleman was, after passing the prescribed examinations of the Incorporated Law Society, admitted an Attorney of the Court of Queen's Bench, since merged into the High Court of Judicature, on the 30th January, 1873, and on the day following he was admitted to the High Court of Chancery, also subsequently merged in the High Court of Judicature. Mr. Paley afterwards proceeded to the Cape, and was here admitted an Attorney of the Eastern District's Court on the 12th of July, 1877, and on the 18th March, 1880, he was further admitted an Attorney of the Supreme Court of Natal. On the 23rd of February, 1882, Mr. Paley was admitted on the roll of the High Court of Griqualand, and entered into partnership with Mr. Attorney J. J. Coghlan in February, 1884, and so continued until August 31st last, when the partnership was dissolved by mutual consent. The career of the deceased gentleman furnishes abundant proof of courage and energy. He served as a volunteer in the Albany Mounted Volunteers under Col. Minto in the Gaika and Gcaleka war, subsequently obtaining a commission in Col. Pulleine's Rangers. In the Zulu War Mr. Paley served as Captain in Lonsdale's Horse, and also held the same rank in the Bechuana-

land Field Force under Col. Sir Charles Warren, K.C.B., G.C.M.G. Mr. Paley held the South African War Medal for 1877-8-9; further, for gallantry in saving a life in the Vaal River a few years ago, was awarded a certificate by the Royal Humane Society of London.

SECURITIES "TO BEARER" AND THE RIGHTS OF THE THIRD PARTIES.

In Vol. XXXVI. of the Law Reports (Chancery Division) will be found a case bearing upon the pledge of share certificates, indorsement in blank, and also relating to the usage of merchants with respect to share certificates indorsed in blank. Cases of this class must inevitably become more and more important to bankers, brokers, dealers and all others of the community who, in various capacities become mixed up, or even temporarily concerned in, transactions in shares. Brokers are a class of people, who, although in general they are trusted and in most instances prove themselves worthy of their trust and for the very good reason that another course of conduct would result in the abolition of their calling. There are exceptions to every rule. It is when the departure from ordinary rules and observances leads to litigation that an opportunity is offered for an examination into the various incidents of their calling, and of the rights and obligations to which the dealing in shares in various capacities, by various bodies, in various countries necessarily give rise.

In the present case, *Williams v. Colonial Bank* (L. R. 36 C. D. 659), a firm of brokers received from the Executors of one J. M. Williams, deceased, 121 certificates representing 1,210 shares in the *New York Central and Hudson River Railroad Company* for the purpose of getting the shares registered in the names of the Executors which would enable them to receive dividends and to sell. The brokers, honest up to a certain point, sent the certificates to America from whence they were returned for the purpose of receiving the signatures of the Executors to the transfers. The Executors signed, in blank, and returned them to the brokers.

But now the brokers applied the certificates to their own uses by depositing them at banks to secure the banks against loss in connection with the balance due or to become due from the brokers. This was in February and April, 1881. In December, 1882, the brokers represented the certificates were at New York, and were there pending the Executors instructions, and on the 5th February, 1884, the brokers were adjudicated bankrupts. Then, of course, the Executors discovered what had been done with their share certificates, and proceeded to sue one of the banks claiming a declaration that the deposit by the brokers was in fraud of plaintiffs' rights, and conferred no title on the bank. They further claimed delivery to themselves of the certificates, and for an injunction restraining the bank from dealing with the property, and from applying for any alteration in the books of the Railway Company in America.

The defendants (the bank), alleged that they accepted the certificates from the brokers in good faith, believing they belonged to them (the brokers), that the usage of bankers was to pass property in these shares by delivery of the indorsed certificates, which, by American law, were negotiable securities. It was further alleged that the blanks in the transfer could be filled in by the holder, and that the person so nominated would be registered by the Company. That the Executors had impliedly authorised what the brokers had done, and that to pledge shares for employers was the ordinary business of stock brokers. The bank, in a counter claim, asked for a declaration that they were entitled to a valid charge on the shares, and for an order on the Executors to do all things necessary to vest the shares in the bank.

The evidence established that by the laws of New York the holder of certificates endorsed had a legal title without registration, and, as to London, that such certificates passed from hand to hand and were considered to confer a title. It was argued for the plaintiffs that the certificates were not negotiable instruments, and that, consequently, the legal estate remained in the Executors who could only be stopped from denying the right of the brokers to pledge if they knew that the title would pass by delivery. By taking the certificates without any reference to the Executors the bank did so at their own risk (*France v. Clark*, 26, C. D. 257 ;

Rumball v. Metropolitan Bank, 2 Q. B. D. 194). For the Bank it was argued that the Executors knew their position when sending the certificates to the brokers, that for estoppel it was not necessary to show positive negligence, but that power was given to the wrong doer. Here, however, the plaintiffs had been negligent in leaving the certificates without inquiry from 1881 to 1884. These being American securities should be dealt with according to American law, which was that when once indorsed they passed from hand to hand, and that the legal title was in the holder who could get them registered after filling up the blanks which he had power to do (*Goodwin v. Roberts*, 1 App. Cas., 476; *Easton v. London Joint Stock Bank*, 34 C. D. 95; *Wilmot v. Barber*, 15 C. D., 96; *Carr v. L. & N. W. R. Co.*, L. R., 10 C. P., 307). The Bank were entitled to be treated as absolute transferees, and to have their title completed if anything more were required.

In delivering judgment Mr. Justice KEKEWICH held that the real meaning of a certificate, both on its face and on the back, such as those in this case, was entirely a question of American law. If it were to be construed as an English document, His Lordship would not construe it as American witnesses had described it would be construed in America where, "in cases in which persons had equal rights in equity, the right of the person having the legal title prevailed, and where, according to the law of New York, a person not on the register of shareholders might have a legal title to shares in a Company." As to this distinction between legal title and legal ownership, which had been made by an American expert witness, Mr. Justice KEKEWICH pointed out that there could be no such distinction in English law under which a man must have the legal title in order to be the legal owner. His Lordship also held that in doing what they had done, the brokers had acted in fraud of their clients; nor did he consider that negligence in the Executors had led to what occurred. In deciding on the claim of the Colonial Bank to hold the shares as the legal owners, and to insist on their legal title, according to American law, by way of security for moneys advanced, two questions must be considered:—1. What was the evidence of the usage of the "monetary" world respecting documents of this kind; and, 2, if the usage was as represented by the defendants, were the Executors bound by it

so as to be deprived of the shares as part of their testator's estate?

Upon the first point His Lordship held that for a long time the monetary world had been used to accept these documents as securities to bearer on which Bankers made advances, and that consequently the Colonial Bank was not put upon inquiry by the fact of the persons depositing the certificates being brokers. Upon the second point the plaintiffs must be held to have given their brokers all that authority which, by the law merchant, went with the particular instrument. The plaintiffs must be taken to have known the nature of the securities they held. Plaintiffs were precluded from asserting that the brokers were not, by the custody of the documents with plaintiffs' assent, authorised to deal with them as they might consider desirable. That the brokers abused the confidence reposed in them was unfortunate, but the Executors, who had rightly placed confidence in the brokers, had authorised the brokers to do what they thought necessary as the nominees and attorneys of the principals, who could not now deny their authority. His Lordship accordingly held that the Bank had a charge on the certificates with interest and costs, as an ordinary mortgagee, but held also that the Bank, having no contract whatever with the Executors, had no claim to any other relief.

The gist of the whole of this case appears to be the ruling, which can hardly be disputed, that a broker or agent employed to deal with documents equivalent to securities to bearer has "all that authority which by the law merchant" goes "with that particular instrument, that the persons so employing a broker must be taken to have understood the nature of the securities which they held, and that the employers of a broker who, as in the present case, betrays his trust in connection with documents intrusted to him in the nature of securities to bearer, cannot repudiate the authority which they must be deemed to have given him. Otherwise, where would be the certainty or security of the mercantile community? In busy centres it would be intolerable for bankers, merchants and others to be expected to go behind the manifest, nature of documents to bearer which come to them in the ordinary course of business, while it would be equally troublesome if bankers and merchants had the duty cast upon them of investigating the right of brokers, the very class with which they principally deal,

to negotiate documents in the nature of securities to bearer. If the law should be otherwise it would not require to be extended very much in order to render it obligatory on the public to investigate the title of every person to pass bank-notes, or even cash, which he might have in his possession.

After all the decision is one which is quite in harmony with, and which is based upon the same principles, as a series of cases to be found in the text-books. It is certainly in accordance with the remarks of the late Mr. Justice BYLES, in *Swan v. North-British Australasian Co.* (2 H. & C., 184-5), who lays down that "the object of the law merchant as to bills and notes made or become payable to bearer, is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle, the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction being a forgery would, in ordinary cases, convey no title), may give a good title to any sum fraudulently inscribed within the limits of the stamp. . . . Negligence in the matter of an instrument payable to bearer makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker, or stolen from him; still he must pay. The negligence of the holder, on the other hand, makes no difference in *his* title. However gross the holder's negligence, if it stop short of fraud, he has a title, . . . the law respects the nature and uses of the instrument more than its own ordinary rules."

In the present case, of course the Colonial Bank was in no sense a party to the misconduct of the brokers. The question for decision was as to whether the brokers, acting in fraud of the rights of their principals, were able to give the Bank a good title to the share certificates as against the Executors, the owners. Mr. Justice KEKEWICH has, in effect, held that "the law respects the nature and uses of the instrument." The Bank was innocent of any fraud in the brokers to whom the Executors had intrusted mercantile documents, whose very nature is that of "securities to bearer." In pointing out that the Colonial Bank was in no way put upon inquiry, seeing that the brokers were acting with them in the ordinary course of brokers' business. Mr. Justice KEKEWICH

observed that if a Court were to hold that whenever a broker tenders securities the Bank is put upon inquiry, it might or might not conduce to stricter dealings, and might or might not be a good thing for the commercial community, but it would certainly overrule many cases which have gone on the opposite principle.

Business people would very likely take the view that to deprive negotiable instruments and "securities to bearer" of the ordinary attributes with which the custom of merchants, or of "the monetary world" has invested them would be to stop the business of bankers, brokers, and money dealers altogether. The Colonial Bank, in the present case, had, in good faith, advanced money to brokers on the security of documents, which were of such a nature as to admit of brokers employing them as was done here although as it turned out dishonestly. It is laid down by Dr. Broom (Legal Maxims, Ed. 5, p.p. 469-70), that there are several cases directly opposed to the rule of Civil Law: *Nemo plus juris ad alium transferre potest quam ipse haberet*, (Dig. 50. 17. 54), or, as expressed by Pothier (2 Oblig. 263) *Nemo plus juris in alium transferre potest quam ipse habet*. And it is in cases falling under the law-merchant that these exceptions are found, principally in the rules of law which govern negotiable instruments, the policy of the law being to favour the negotiability of such instruments provided the transfer be effected "in the usual and ordinary manner, whereby a title is acquired according to the law-merchant" (*Whistler v. Forster* 4 C. B., N. S. 248, 257-8; *Deuters v. Townsend*, 5 B. & S., 613, 616).

Some points incidental to a case of the class to which *Williams v. Colonial Bank* belongs may be considered to underlie, in a measure, the case of *Van der Merwe v. Webb* decided in the Eastern Districts Court of this Colony in 1883. There the question was as to the rights of the original owner of cattle which had been stolen, to recover them back from a *bonâ fide* purchaser on public market without indemnifying the latter in the amount paid by him. The Court appear to have held somewhat strictly to the maxims of Civil Law, *Nemo plus juris ad alium transferre potest quam ipse haberet*, and *Id quod nostrum est sine facto nostro ad alium transferri non potest* without considering, and indeed Counsel do not appear to have led the Court to consider, any exceptions in

favour of the law merchant. It should be noted that the learned Chief Justice of the Transvaal refused to follow the above decision by the Eastern Districts' Court on the ground that by Roman-Dutch Law and the common law of the Colony a purchaser in market overt is entitled to retain the property so purchased as against the true owner until the latter tenders him the purchase price. The Eastern Districts' Court Judges were not invited to consider any other state of facts than those connected with the theft of oxen and their sale in public market, and decided against the contention that *market overt* existed in this Colony.

But in course of time even the maxims of the Civil Law, known to and incorporated into the principles of English law as they are, must come to yield to the necessity which the Courts of commercial communities are under of encouraging trade and commerce and of permitting, to this end, equity, sometimes to over-rule the law. The Bench of every country is obliged, as time progresses, to adopt its own "policy" of law in dealing with some classes of cases, even if the result must be to do what, after all, has been done in the Roman-Dutch Law itself, viz. : permit exceptions to the apparently unbending spirit of maxims of the Civil Law. However, the time seems to be rapidly approaching when this important branch of law will be more frequently considered in our Law Courts than has been the case hitherto, and the onus will be cast upon Judges of deciding whether they shall of themselves build up their system of Commercial Law, or look for guidance to the maxims of Civil Law on the one hand, or on the other to the four corners of legislative enactments.

HEIRS OF HIDDINGH VERSUS EXECUTORS OF HIDDINGH.

On the 16th November, 1883, the plaintiffs issued a summons out of the Supreme Court against the defendants for an amendment of the defendants' liquidation accounts, by expunging certain items relating to the sale of shares, and also claimed damages sustained on the sales of certain shares and debentures.

In their declaration, the plaintiffs stated that part of the testator's estate consisted of shares in companies; that for a considerable time after his death the shares were in public demand, and profitable prices might have been obtained for them; that the defendants did not dispose of any of the shares until the 14th day of July, 1883, when they sold some at prices far less than might have been obtained earlier, and they claimed £1,138 17s 6d as damage on account of the negligence charged.

From the evidence it appeared that P. Hiddingh died on the 30th September, 1881. The executors were Denyssen, as Secretary of the S. A. Association, P. De Villiers and the widow. Letters of administration were granted on the 13th of October, 1881. In the estate was a large number of shares, many of them of unlimited companies. In October, 1881, tenders were called for certain shares, and tenders were received but at unsatisfactory prices. Certain of the shares, viz., South African Bank shares, were then selling at £35, and tenders for part of these were received at £30 and £33. Tenders were again called for in Dec., but with no better result. Nothing further was done until the 4th April, 1882, when the Association wrote to the heirs asking them if they would take over the shares. The heirs, by a letter dated April 4th, 1882, which was signed by the Executrix, Mrs. Hiddingh, on behalf of a minor heir, refused to take over the shares and "*therefore requested the Executors to dispose of the same as soon as possible.*" From January, 1882, the price of shares fell slowly and surely month after month. The plaintiffs produced in evidence certain share lists which were sworn to as a correct guide of the market prices for the year 1882. From April, 1882, to May, 1883, the executors made no attempt to sell or dispose of the shares, and though the heirs were in constant communication with them, they did not have any communication with the heirs on the subject of these shares until May, 1883. Two of the Directors of the South African Association stated that the subject of these shares was often under consideration, but they thought it better to wait as it would be undesirable to realise the shares with a falling market and a reasonable prospect of a rise at no distant date. No other reason was given for their inaction, nor any evidence as to the reasons for expecting a rise.

In point of fact they did not sell till July, 1883, after they had been warned by the plaintiffs' solicitor that they would be held responsible for loss.

Upon these facts the Supreme Court gave judgment in favour of the *defendants* on the 14th Jan., 1884 (reported in 2 Juta p. 414) on the ground that the Executors did no more than exercise a discretion which was vested in them. The law which the Chief Justice applied to the case was laid down by him as follows: "The correct view appears to me to be that in the opinion of the the Legislature, six months is not as a general rule an unreasonable time to allow Executors to realize, and that, under certain circumstances, twelve months and more may be perfectly reasonable. I would go even further, and say that where a loss has occurred through the failure of an Executor to realize, within six months of his acceptance of the trust, the onus would lie upon him of proving that he acted *bonâ fide* and exercised a reasonable discretion. In deciding whether a reasonable discretion was exercised or not, the Court would look into all the circumstances of the case, such as the nature of the investment, the confidence the testator had in the investment, the efforts made by the Executor to realize, the state of the market, and of course, as an important ingredient, the length of time which has elapsed since the testator's death. But I cannot concur in the view that mere error of judgment after the lapse of six months, would be sufficient to fix the Executors with liability."

The Plaintiffs appealed from the judgment of the Supreme Court to the Privy Council, which Court *reversed* the judgment of the Supreme Court (12 Appeal Cases, 629). The judgment of their Lordships was delivered by Lord HOBHOUSE, who remarked on the absence of any rule laid down in the Colony equivalent to the arbitrary but convenient rule adopted by the Court of Chancery in England, that a year should be taken as the ordinary reasonable time within which an Executor should realize investments which it is not proper to retain. In the Court below the Chief Justice suggested that in the Colony six months would be a reasonable period, because that is the time by which it is expected that liquidation accounts shall be lodged, and after which any person interested may summon the Executors for an account. The Lords of the

Privy Council, in their judgment, would not lay down any general rule on this point, but they thought that having regard to what passed in April, 1882, the Executors having been called upon by the major portion of the heirs to do, as soon as possible, the duty which the law laid upon them, were bound to delay no longer. A sale as soon as possible after the 3rd April, 1882, coincides very nearly with the six months which the Chief Justice laid down to be the reasonable time, and which would expire on the 13th April. Even if the longer period of a year were taken, their Lordships "cannot find that the Executors made any effort to sell during the remainder of that period."

Their Lordships approved of the law as applicable to the case as laid down by the Chief Justice and quoted above, but they held that the executors had been charged not with a mere error of judgment, but with *unreasonable delay and negligence* in performing their legal duty. Their Lordships remarked that the Supreme Court of the Colony appeared to have treated the discretion of the executors as if it were a perfectly free discretion like that of an absolute owner, and that therefore the true test of an executor's reasonable discretion is to see what a reasonable owner might do. From this view their Lordships dissented and held "that an executor's discretion is limited by the duty of bringing the assets into a proper state of investment within a reasonable time. That duty was in this case rendered more imperative by the circumstance that in two sets of shares the liability was unlimited, and the circumstance that the inheritance was subject to trusts in favour of unborn persons, which must endure for many years and for which investments of stable character were especially required. And it was a duty urged upon the executors by the greater part, if not the whole, of the adult heirs." Their Lordships agreed with the Supreme Court that the onus lay on the executors of proving that they acted *bonâ fide* and exercised a reasonable discretion,—but in their Lordships' opinion the executors had not proved that they had exercised a reasonable discretion. The nature of the investments was such as to demand conversion, the executors made no efforts to realize between December 1881 and July 1883; the state of the market was such as to create alarm and the length of time was excessive.

On these grounds the Privy Council reversed the judgment of the Supreme Court and held that the executors were liable for the loss sustained in the sale of the shares. The next question which arose was how was this loss to be estimated. The rule in England is, that if the executor fails within a reasonable time to convert investments which require conversion, the end of a year is, in the absence of circumstances pointing to a different date to be taken as the time for ascertaining the value which he ought to have got. The Chief Justice however, in his judgment, suggested that in the Colony six months must be taken as a reasonable time within which the executors should realize the assets of the estate and this suggestion was adopted by the Privy Council, who ordered an inquiry what was the mesne market value of the shares of the four Companies which the executors could have realized on the 13th April, 1882, or as near thereto as can be ascertained and to charge the executors with that value with lawful interest from that date. Their Lordships also disallowed the items of expense incurred after that date by the executors in connection with the shares and charged in their account. On the other hand the executors were allowed the amount of dividends on the shares accrued since the 13th April, 1882, with interest, and also the price of purchase money actually credited to the estate on sale of shares with interest; also the shares themselves if any remain on the executor's hands. As to costs their Lordships thought that justice would be done by ordering the Plaintiffs' costs of suit as between solicitor and client to be paid out of the estate and by making no order with respect to the costs of the executors.

DIGEST OF CASES.

SUPREME COURT.

Roll v. Town Council of Capetown.—(Nov. 28, Dec. 1.) By the Capetown Municipal Acts No. 44, 1882, and No. 28, 1885, if the tenant of a house neglects to pay the tenant's rate for the year the landlord may be sued for the same without previous demand being made on the tenant.

De Villiers v. De Villiers.—(Nov. 29-Dec. 8).—A town attorney was instructed by his country correspondent to pass a first bond for a loan to be made by a client, and to telegraph as soon as the papers were in order. The town

attorney passed a bond notwithstanding that he became aware that there was a previous bond existing on the property, and telegraphed merely "bond lodged." Thereupon the money was paid out by the country agent in ignorance of the prior bond. On discovering the true state of affairs, the debtor was sued and judgment recovered against him, but before anything could be realised he surrendered his estate. The bond passed proved valueless in consequence of the bond previously existing. The town attorney was held liable for the amount lost and for the cost of the action brought against the debtor.

Albertyn v. Van der Westhuysen.—(Dec. 8.) A leased a part of his farm to a tenant, who cultivated the same. While the crops were still standing on the ground A became insolvent. The trustee of his estate, notwithstanding protest made, sold the crops of the tenant, claiming the right to do so as the farm had been mortgaged before the lease. Upon application made by the tenant the Court interdicted the trustee and the purchasers from interfering with the crops, with cost, leaving the trustee to proceed by action if so advised.

Municipality of George v. Pulvermacher.—(Dec. 13.) By the George Municipality Act, if the owners of unoccupied land did not for a certain number of years pay their rates, the Municipality had the right to lease the land and apply the rent so received in paying off arrears and current rates payable by the owner. The Municipality leased certain land to defendant and others, and the lessees inadvertently paid to the Municipality rates thereon recoverable only from the owner. The lessees were held entitled to deduct the amounts so paid from the rent claimable from them by the Municipality.

Lippert v. Adler.—(Dec. 1-14.) The defendant sold to plaintiff certain shares in a Gold Mining Company then just floated, and the scrip of which had not been issued, upon terms of cash against documents. The defendant tendered and plaintiff accepted on informal certificate which set forth that one H was entitled to the number of shares sold. Before this document was presented at the Company's Office the Company had sent the scrip to H. No application was made by plaintiff to H, but he sued defendant for breach of contract. *Held*,—that plaintiff was not entitled to recover, especially as the evidence showed that the scrip could have been obtained on application to H, and was now lying at the Company's Office for delivery upon presentation of the original certificate (the decision in *Stewart v. Siebel*, 4 Juta, 435, held not applicable), SMITH, J., *dissentiente*, holding that plaintiff had done all that could be reasonably expected of him, and the document delivered to him having proved insufficient to obtain the scrip upon, he was entitled to recover damages.

Kimberley Public Gardens Committee v. Colonial Government.—(Dec. 15.) In constructing the Kimberley Extension Railway the Government expropriated portions of a farm belonging to the London and South African Exploration Company. Part of the land so expropriated formed a portion of the public gardens held by the Committee on lease at a nominal rent from the Exploration Company. The Committee sought to compel the Government to submit to arbitration a claim for compensation, but the Government refused to deal with any one except the registered owner of the property. *Held*, that the Committee were not the owners of the land within the meaning of Act No. 9, 1858, and consequently had no *locus standi*.

Re S. A. Bank.—(Dec. 15.) The Shareholders of the Bank had resolved upon private liquidation, and appointed three shareholders as liquidators, leaving the question of their remuneration over for future consideration. Owing to difficulties arising in making calls and other causes, the Bank was placed under the Winding-up Act, and the private liquidators were appointed official liquidators by the Court, and the amount of their remuneration as such official liquidators was fixed at 2½ per cent. on the amounts to be received by them, the Court leaving it to the Shareholders to fix the amount to be paid to the private liquidators be-

fore the placing under the Winding-up Act. While acting as private liquidators the three shareholders had received moneys and liquidated claims on the bank to the extent of £165,000. At a meeting of Shareholders called to fix their remuneration, proposals were made to give them various sums up to £2000, but ultimately £300 only was carried by a majority. The private liquidators now applied to the Court to fix the sum to be paid to them, alleging that the amount voted was unreasonable and wholly insufficient. The Court, in the absence of *malâ fides* declined to interfere with the decision of the shareholders; but left it open to the official liquidators at the close of their services to apply for such further remuneration as the Court should see fit to grant.

Smit v. Tonkin—(Dec. 16.) The plaintiff, a money lender, employed the defendant to make loans. After consultation with plaintiff a loan of £500 was made upon security of first mortgage on one farm and of second mortgage of another farm, with two personal securities. The farms were valued for Divisional Council together at £6,500 and the first bond was for £1,000. The debtor and the personal securities all became insolvent, no purchaser could be found for the one farm and the other was bought in by the first bond-holder at less than his claim. *Held*, that in investing plaintiff's money defendant was bound to exercise the same care and diligence that a prudent and cautious man would exercise in investing his own money; and that applying that test to the present case the plaintiff must fail.

Gous and Roussouw v. De Koch—(Dec. 19-21.) The defendant was a speculator, and the plaintiffs were farmers residing near the Orange River. The plaintiffs were proceeding to Capetown with a troop of 150 fat cattle for sale, and *en route* promised Van Rhyn, who was agent for Combrinck & Co., that they would give Combrinck & Co. the refusal of the cattle. Combrinck & Co. were butchers in a large way of business, and had the reputation of dealing liberally with sellers. Defendant hearing from Van Rhyn about plaintiffs, intercepted them, and representing that he was acting for Combrinck & Co., bought the cattle for cash at prices ranging from £3 10s. to £5 12s. 6d. Defendant afterwards resold 100 of the oxen to Combrinck & Co. for £7 each, and altogether cleared £197 10s. on the transaction. The plaintiffs sued to have their contract with defendant declared null and void as having been induced by fraud and misrepresentation, and the restoration of the cattle or the payment of their due value. The Court found that the plaintiffs had been induced to sell through defendant's fraud, and as the cattle had since been slaughtered gave judgment for plaintiffs for £197 10s. as damages and costs.

Van Vuuren v. Van Vuuren's Executors—(Dec. 21-22.) Husband and wife married in community, made a joint will, appointing the survivor together with their only son, the plaintiff, their sole heirs. On the death of the wife the surviving husband paid the son his share of the movable property, and entered into a notarial contract whereby the son promised to allow the father the life interest in a certain farm, which had been brought into community by the mother, and the father undertook that the whole farm should go to the son on his death. There was some dispute as to the value of the estate, and this contract was apparently in consideration of a settlement and compromise of all claims. The father afterwards remarried in community, and died, leaving his second wife his executrix. The son now sued the executrix to compel the transfer of the farm. For the defendant it was contended that the farm being registered in the father's name, had come into the second joint estate, and that at most the son was entitled only to one half of the farm, but the Court upheld the notarial agreement, and ordered transfer of the whole farm be given to plaintiff.

Combrinck & Co. v. De Koch—(Dec. 19, Jan. 12.) This was an action arising out of the circumstances stated above in the case of *Gous & Roussouw v. De Koch*. The plaintiffs sued for £100 damages and an interdict restraining defendant

from again using their business-name in his transactions. The Court gave judgment for plaintiff for nominal damages, holding that plaintiffs were entitled to the sole use of their business-name and reputation; but as there was no ground for believing defendant would repeat the offence, did not grant the interdict asked for.

Queen v. Klaas Hendriks.—(Jan. 12.) A prisoner awaiting trial cannot be sentenced to lashes for a contravention of Gaol Regulations.

Queen v. Fretje Williamsen.—The Act No. 19, 1884, does not confer any extended jurisdiction on Magistrates as to punishments on persons convicted of theft by reason of having in their possession fresh meat without being able to give a satisfactory account of the same. *Queen v. John Nabo*, 4 E.D.C. Rep. 371, followed.

Lipman & Herman v. Kohler.—(Jan. 12.) Kohler sued Lipman & Herman in the Free State Courts unsuccessfully. Lipman & Herman had their bill of costs taxed and sued Kohler thereon in the Free State, and recovered judgment but were unable to obtain payment. They now sued Kohler provisionally upon the Free State judgment. Kohler was personally served, but did not appear. Provisional sentence was granted with costs.

King v. Ryal.—(Jan. 12.) On dissolution of partnership one partner bought the other out, giving promissory notes in settlement, and mutual discharges and releases couched in the widest terms were executed. On being sued for the last of the promissory notes the purchasing partner alleged that he had not been aware of the amount drawn by his partner during the existence of the partnership, and claimed a set-off on the footing of such overdrafts. On the other side there was a denial of the allegations. Provisional sentence was given on the promissory notes, leaving the objecting partner to take his remedy in the principal case if so advised.

Toms v. Blackhall.—(Jan. 12.) The plaintiff had obtained a judgment against the defendant for £38 and costs. A return of *nulla bond* was made to the writ. The defendant, an old civil servant, was entitled to a pension of about £19 a month, but he alleged he had other debts to satisfy. The Court allowed an attachment of £5 a month out of the pension until plaintiff's claim was paid.

Pillans v. Porter's Executors.—(Jan. 14.) A father on the marriage of his daughter agreed with his daughter and son-in-law to set aside £2,000; he, however, to keep the control of the money and to pay during his life the interest thereon to the spouses, and after his death the capital was to go in a certain order to the spouses or their children, failing whom to revert to the father's estate. The agreement was not registered. By will the father directed all advances made to any of his children to be deducted from the shares of his inheritance, and directed his executors to get in all debts. *Held*, that the daughter and son-in-law were entitled as against the other heirs to be paid the £2,000 independently of whether or not the daughter's inheritance would amount to such a sum.

HIGH COURT OF GRIQUALAND.

[These cases will appear in full in the *High Court Reports*.]

Chester and Gibb v. Big Ben G. M. Co.—*Discovery.—Production of Documents.—Privilege.—Rule of Court 333.* (Oct. 25).—An affidavit of discovery of documents in the possession or power of a joint-stock Company should be made by the Secretary, and not by one of the trustees of the Company. It is not sufficient to set forth generally the possession of "correspondence" between the Company's Secretary and its agent elsewhere, and to object to produce the same on the ground that it consists of "professional and confidential communications." Particulars should be given as to the documents alleged to be privileged, and the ground on

which such privilege is claimed should be clearly stated.—*Hopley, C.P.*, for the applicants.—*Guerin* for the respondents.—Attorneys: *Caldecott & Phear; Bauman.*

Webb v. Bergsma.—*Act* 20, 1856, § 10.—*Act* 38, 1884, §§ 1, 2.—*Ejectment.*—*Magistrate's Jurisdiction.* (O. t. 25).—B gave notice of his intention to surrender his estate, but the application was refused on the ground that the requirements of *Act* 38 of 1884, as to publication of notice, had not been complied with. While the application was pending, the messenger of the Magistrate's Court sold to W certain property belonging to B., which had previously been attached in satisfaction of a judgment. W. subsequently brought an action to eject B. from the said property, which the Magistrate dismissed on the ground that the sale was illegal and that future rights were involved. On appeal, this decision was sustained.—*Irvine* for the appellant.—*Guerin* for the respondent.—Attorneys: *Coghlan & Coghlan; Roberts.*

Kimberley Borough Council v. Wrigley.—*Municipal bye-laws.*—*Plans of buildings.* (Oct. 25).—Where a person had been convicted of contravening a municipal bye-law by erecting certain buildings not in conformity with the borough regulations or with plans approved by the Borough Council, and it appeared that plans of the said buildings had been submitted and approved but subsequently deviated from, and the bye-law provided no penalty for such subsequent deviation, the conviction was quashed.

Queen v. Quaza.—*Act* 20, 1861, § 9.—*Delivery of Telegrams.* (Oct. 25).—Where a messenger in the service of the Telegraph Department was charged with contravening Section 9 of *Act* 20 of 1861 by fraudulently and maliciously omitting to deliver certain telegrams, and there was evidence of neglect of duty on the part of the prisoner but no evidence of fraud or malice, the conviction was quashed.

Queen v. Smith.—*Act* 12, 1882, § 33.—*Indictment.*—*Policeman.*—*False representation.* (Nov. 15, 17).—S. was charged before a Magistrate with contravening section 33 of *Act* 12 of 1882 by obtaining admission to the police by false representations, and was convicted of that offence. *Held*, on review, that the charge should have set forth specifically the alleged false representations, but as no objection had been taken before the Magistrate, and the wording of the section had been followed, the conviction could not be set aside after judgment on the ground that the charge was wrongly drawn. The alleged false representation was that, in answer to a question "whether he had ever been in gaol and if so for what offence," S had said "No." The evidence shewed that S had been arrested, remanded and subsequently liberated on his own recognisances. *Held*, that the Magistrate was justified in holding it proved on this evidence that S had been actually in gaol, but as it was not shewn that he had ever been convicted of any offence, it did not appear that the representation was clearly and wilfully false, and the conviction was therefore quashed.—*Joubert* for the prisoner.—*Hopley, C.P.*, for the Crown.

Carlis v. Oldfield.—*Magistrate's Jurisdiction.*—*Set-off.*—*Movable property.*—*Act* 20, 1856, § 8.—*Act* 43, 1885, § 5. Nov. 15, 24.—A sued B in the Magistrate's Court for £21 1s. for goods sold. B brought a counterclaim for £27 14s., of which £2 14s. was for goods and £25 for shares sold. At the trial B admitted A's claim and A admitted B's counterclaim for £2 14s. but denied the balance. The Magistrate thereupon gave judgment for the amounts admitted and dismissed B's claim for the price of the shares as beyond his jurisdiction. On appeal, the Court held that the claims of both parties, being of a sufficiently liquid character to admit of compensation, were brought by set-off within the Magistrate's ordinary jurisdiction, and accordingly remitted the case for further hearing. Shares in a joint-stock company are not "other movable property" within the meaning of *Act* 43 of 1885, Section 5 (b).—*Frames* for the appellant.—*Guerin* for the respondent.—Attorneys: *Roberts; Playford.*

Ex parte Bennett's Executor.—*Practice.*—*Registration of Title.*—*Act 28, 1881.* (Nov. 24).—A petition for the registration of title to im-movable property under the provisions of Act 28, 1881, should be laid in the first instance before a Judge in Chambers and not made to the Court.—*Irvine* for the petitioner.—Attorney: *D. J. Haarhoff.*

Blackwell v. Holt.—*Defamation.*—*Publication.*—*Exception.* (Nov. 24).—A sued B for the publication to C and D of a libel, contained in an anonymous letter. B admitted that he shewed the letter to C and D and consulted them about it confidentially, but pleaded that the publication to C was privileged, and that in the case of D he did not shew him the contents of the letter, but merely consulted him about the handwriting. An exception to that portion of the plea which referred to the shewing of the letter to D was overruled.—*Lord, Q.C.*, for the plaintiff.—*Hopley, C.P.*, for the defendant. Attorneys: *Campbell; Knights & Hearle.*

Le Riche v. Van der Heuvel.—*Interpleader.*—*Sale of movables.*—*Delivery.* (Nov. 24).—A claimed certain furniture which had been attached by a judgment creditor of his brother B, and produced a deed of sale executed by B ten months previously. The furniture had meanwhile remained in the same house, which was occupied by B, except during a short period when A was in occupation during B's absence, but it was alleged that B on resuming occupation had agreed to hire the furniture from A. The Magistrate after hearing the evidence of A and B held the property to be executable, and this decision was confirmed on appeal.—*Guerin* for the appellant.—Attorneys: *Buckland & Fitzpatrick.*

Miselwitz v. Kimberley Borough Council.—*Ordinances 7 of 1877 and 17 of 1879, G.W.*—*Act 20, 1884.*—*Hawker's Licence.*—*Municipal Bye-laws.* (Nov. 24).—A hawker, licensed to hawk in the district of Kimberley, was convicted of contravening a municipal bye-law by selling goods in a public thoroughfare within the borough of Kimberley without the permission of the Borough Council. *Held*, on appeal, that this bye-law was not *ultra vires* and that the conviction must therefore be sustained.—*Guerin* for the appellant.—*Feltham* for the respondent Council.—Attorneys: *Coghlan and Coghlan; Coryndon and Caldecott.*

Ablett and another v. Lynch.—*Pleading.*—*Qualification of Plaintiff.*—*Exception.* (Dec. 1).—A agreed on certain terms and conditions to transfer the lease of a mine to certain parties described as the guarantors of a syndicate about to be formed for the purpose of developing the said mine, with the further object of forming a joint-stock Company, or to the nominee or nominees of the said guarantors. B and C sued A for the specific performance of this agreement. In the title of the declaration they were described as suing in their capacity as trustees of the syndicate, and in the body of the declaration they were alleged to be the proper persons to sue on behalf of the syndicate. *Held*, that, as there was nothing to shew that the plaintiffs were either the nominees or cessionaries of the original parties to the contract, an exception to the declaration must be sustained.—*Guerin* for the plaintiffs.—*Hopley, C.P.*, for the defendant.—Attorneys: *Knights and Hearle; Coghlan and Coghlan.*

Donaldson v. Webber.—*Master and Servant.*—*Wrongful Dismissal.*—*Measure of Damages.* (Dec. 1).—D, a tradesman, engaged W to manage a branch business at a monthly salary, the engagement to be terminable on reasonable notice. After some months D, without notice, removed W from his position as manager of the branch, but offered him a place as assistant in his own shop at the same salary. W declined this offer and sued for wrongful dismissal. The Magistrate gave judgment for the plaintiff, and awarded as damages a sum calculated at the rate of his monthly salary up to the date of trial, and which amounted to about half a month's salary. On appeal by the defendant this decision was sustained. *Lord, Q.C.*, for the appellant.—*Guerin* for the respondent.—Attorneys: *Coghlan and Coghlan; Playford.*

Le Cornu v. The Queen.—*Act 28, 1883, §§ 73, 77.—Indictment.—Licensed premises.—Proof of sale.* (Dec 2.)—L was charged with contravening section 73 of Act 28 of 1883 by keeping his licensed premises open for the sale of liquor at a time not authorised by his licence. Exceptions to the charge on the ground that it did not allege that L was the holder of a licence, or specify what portion of the premises was kept open, were overruled. The evidence shewed that several men were found in the bar of the premises of the accused after hours, with liquor and empty glasses about, and one of the men was seen to pour out some liquor. L was convicted, and on appeal the conviction was sustained.—*Guerin for the appellant.—Hopley, C.P., for the Crown.—Attorney: Badnall.*

Packman and another v Gibson Bros.—*Passenger carriers.—Tramway.—Negligence.—Evidence.—Burden of Proof.* (Dec. 6, 10.)—In an action brought by a passenger in a tram car against the proprietors for injuries caused by an accident to the car, which had been upset; *Held*, that the circumstances of the accident raised a presumption of negligence which it was the duty of the defendants to rebut. The defendants having pleaded that the accident was caused by the conduct of a third party, and also that the injury sustained by the plaintiff was the result of her own negligence; *Held*, on the facts, that these pleas had not been proved, and that the evidence shewed that the accident was caused by the absence of due care or skill on the part of the servants of the defendants, for which they were responsible.—*Guerin for the plaintiffs.—Hopley, C.P., for the defendants.—Attorneys: Caldecott and Phear; Dewhurst.*

Macdonald v. Griqualand West D. M. Co.—*Act 17, 1860.—Patent.—Infringement.—Validity.—Evidence.—Burden of proof.* (Dec. 9, 10.)—Where the defendants in an action for infringement of patent rights admitted the grant but denied the validity of the said patent, on the grounds *inter alia* of absence of originality, previous publication and prior user; *Held*, that the right to begin was with the defendants, the burden of proof being upon them to establish the grounds of invalidity set forth in their plea.—*Guerin for the plaintiff.—Hopley, C.P. (with him Lange), for the defendants.—Attorneys: Playford; D. J. Haarhoff.*

CORRESPONDENCE.

THE EXECUTION OF WILLS.

SIR,—With reference to the remarks in your last issue on the Execution of Wills, allow me to refer to the Statute 1 Vict., c. 26, § 9, which regulates the execution and attestation of wills made in England since the year 1837. It provides:—

“That no will shall be valid unless it be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”

English wills, then, appear to be signed only at the end of the will, and not even on every sheet, much less as with us on every

leaf on which it is written. Notarial wills were of much more use formerly in this Colony, and as the will was preserved in the Notary's protocol, there was little room for fraud by means of interpolation or removal of leaves in the will. As underhand wills are now the most common, it may perhaps be a wise precaution to require signature on every sheet, but I certainly agree with you that the present law requiring them to be signed on every leaf is unnecessary, and has led testators into a pitfall. LEX.

CONTENTS OF EXCHANGES.

The Law Quarterly Review. Vol. IV., No. 13. For January, 1888.
London: Stevens & Sons.

The Land System of Ireland II. (His Honour Judge O'Connor Morris)—The Beatitude of Seisin I. (F. W. Maitland)—The Law of Settlement and Removal (F. C. Montague)—Compulsory Pilotage (R. G. Marsden)—Registration of Title in Prussia (C. Fortescue Brickdale)—Evidence in Criminal Cases of Similar but Unconnected Acts (Herbert Stephen)—Public Meetings and Public Order. I. Italy (Senator Tommaso Corsi)—Reviews and Notices—Notes—Contents of Exchanges.

The Journal of Jurisprudence and Scottish Law Magazine. Vol. XXXII., Nos. 372 and 373. For December, 1887, and January, 1888.
Edinburgh: T. & T. Clark.

No. 372. The legal position of Dissenting Churches in Scotland—The Limited Owners of Land (Scotland) Bill—An Improved Chair of Scots Law—An Irregular Marriage. No. III.—The defects of the Employers' Liability Act, 1880. No. II.—Reviews—Notes.

No. 373. The Development of Right and the Right of Development—The Medical Jurisprudence of Inebriety—Marriage in the German Middle Ages—Recent Legislation. I. For Scotland—International Law in 1887—Trial by Jury in Civil Cases—Correspondence—Reviews—Notes.

The Scottish Law Review and Notes of Cases. Vol. III., No. 36 and Vol. IV., No. 37. For December, 1887 and January, 1888.
Glasgow: William Hodge & Co.

No. 36. Should the Jurisdiction of the Sheriff Court be Extended and in what way (Sheriff Spens)—The Reform of Private Bill Legislation—Literature—Obituary—Notes from Edinburgh and London—Notes—Sheriff Court Reports—Digest of Cases—Index to Vol. III.

No. 37. Recent Questions under the Agricultural Holdings Act—School Board Elections—Literature—Obituary—Notes from Edinburgh and London—Appointment of Procurators—Fiscal—Meetings of Law Societies—Appointments, &c.—Sheriff Court Reports.

The Canadian Law Times. Vol. VII., Nos. 15-17. For November and December, 1887. Toronto: Carswell & Co.

No. 15. Sale of Equities of Redemption under Process—Editorial Review: Fraudulent Judgments; Delay in the Court of Appeal—Supreme Court of Canada—Book Reviews—Review of Exchanges—Occasional Notes of Cases in the Supreme Court of Canada; Supreme Court of Judicature, and High Court of Justice of Ontario; Supreme Court, Nova Scotia; Queen's Bench, Manitoba.

No. 16. Occasional Notes of Cases in the Supreme Court of Judicature and High Court of Justice of Ontario; and Supreme Court of Nova Scotia.

No. 17. Quebec Resolutions of 1887—Editorial Review: Sir Adam Wilson's Farewell; Changes in the Judiciary; Fixing and Postponing Cases; Review of Exchanges—Occasional Notes of Cases in Supreme Court of Nova Scotia; Supreme Court of Judicature and High Courts of Justice of Ontario; and Supreme Court of New Brunswick. *Canada Law Journal.* Vol. XXIII., Nos. 19-21. For November and December, 1887. Toronto: C. Blackett Robinson.

No. 19. Editorial: Supreme Court, Order as to Chamber Business; Chief Justice Wallbridge—Recent English Decisions—Selections—Reports: Division Court, Ontario—Notes of Canadian Cases: Common Pleas Division; Practice—Law Students' Department, &c.

No. 20. Editorial; Odds and Ends; Rules of Law and Rules of Construction; Judicial appointments; Mr. Justice O'Connor—Reports: Ontario—Notes of Canadian Cases: Supreme Court; Court of Appeal; Chancery Division; Practice—Board of Trade, &c.

No. 21. Editorial: Odds and Ends; Judicial appointments; Sir Adam Wilson, Knt.; Disallowance; Legal Legislation; Recent English Decisions—Notes of Canadian Cases: Court of Appeal; Chancery Division; Practice—Flotsam and Jetsam, &c.

NOTES.

Archiv für Theorie und Praxis des Allgemeinen Deutschen Handels- und Wechselsrechts. It is with much regret that we have to announce that this interesting legal magazine has been discontinued. It had completed its forty-eighth volume, and had thus attained an age when, one would have thought, its success was secure, and especially so in a leading Capital like Berlin. But like many others it appears to have suffered from the ups and downs of life and no doubt from the absence of support which it so well deserved. We shall miss it from among our Exchanges and must accord our thanks to Dr. Kohler for having placed it there.

SIR ADAM WILSON, KNT.—From our Canadian Exchangees we learn that Sir ADAM WILSON has resigned his position as Chief Justice of the Court of Queen's Bench and President of the High Court of Justice of Ontario. He was born in 1814 and went to Canada in 1830. Having been called to the Bar in 1839 he was raised to the Bench in 1863 and became Chief Justice of the Common Pleas in 1878 and of the Queen's Bench in 1884. On the occasion of his retirement Mr. Æmilius Irving, Q.C., representing the Benches and the Bar presented to him expressions of great esteem and regard for his great ability extending over a period of nearly a quarter of a century. The *Canada Law Journal* speaks of Sir ADAM WILSON as one of the most eminent of Canada's Judges and one of the most widely and highly respected of her worthies.

THE JOURNAL OF JURISPRUDENCE AND SCOTTISH LAW MAGAZINE.—This legal periodical published by Messrs. T. & T. Clark of Edinburgh will, it is announced, be much improved, the improvements to commence with the January number of this year. A portion of its contents every month will be devoted to the more scientific discussion of the fundamental Principles of Right and the bearing on Legislation and Legal Practice. Commercial and International Law will also receive further attention. This Magazine is upwards of thirty years old.

THE CIRCUIT LIST.

The ensuing Circuits will be held as follows :—

WESTERN CIRCUIT (Mr. Justice LAURENCE).

Richmond, 19th March, 1888.	Mossel Bay, 3rd April, 1888.
Victoria West, 21st March, 1888.	Riversdale, 6th April, 1888.
Beaufort West, 23rd March, 1888.	Swellendam, 9th April, 1888.
Prince Albert, 26th March, 1888.	Worcester, 11th April, 1888.
Oudtshoorn, 28th March, 1888.	Malmesbury, 14th April, 1888.
George, 31st March, 1888.	

EASTERN CIRCUIT (Mr. Justice JONES).

Somerset East, 6th March, 1888.	Aliwal North, 27th March, 1888.
Bedford, 7th March, 1888.	Burghersdorp, 31st March, 1888.
Fort Beaufort, 9th March, 1888.	Colesberg, 4th April, 1888.
King Williamstown, 12th March, 1888.	Craddock, 7th April, 1888.
East London, 16th March, 1888.	Uitenhage, 10th April, 1888.
Queenstown, 20th March, 1888.	Graaff-Reinet, 12th April, 1888.
Dordrecht, 23rd March, 1888.	Port Elizabeth, 17th April, 1888.

CAPE LAW JOURNAL.

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER VII.

ARRESTS.

This subject is justly regarded by the profession as one of the most important in their practice. Its importance is not because of the actions which frequently arise out of it—no, such a thought is too mundane for lawyers!—but because it affects the liberty of the subject, and very serious injury might sometimes be done to the defendant, or loss caused to the plaintiff, or *vice versâ*, by the issue of an illegal or informal arrest. But I shall endeavour to give a few admitted principles in this brief treatment of this very wide subject—sufficient, however, for all practical purposes.

The word “arrest” is of French origin, *arrêter*, and may be defined as the preventing by a creditor, or other complainant, the departure of his debtor, or other litigant, who meditates flight from the Colony, or from the jurisdiction of his creditor, or other complainant, without paying or securing his debts, or to avoid an anticipated or pending action; or it is to found jurisdiction on a person who otherwise does not belong to the same jurisdiction, but who casually and temporarily comes within it, and who intends to leave it again soon; and in both cases, it is to compel the party to give security to answer the anticipated or pending action, and to abide by the judgment thereon.

Every person who has the *personam standi in judicio*, and who has a claim against another, may cause him to be arrested (see chapter on “Actions.”) Also anyone duly authorised thereto by a power of attorney (Academie der jonge Practicyns, chap. 26). So also an attorney who has authority to act for another has the power also to cause to be arrested the debtor of his principal, though

no special power to arrest was given (Zutphen Ned. Prac., p. 50 ; Vroman 1, 1, 35 ; Wassenaar Jud. Prac., 1, 1, 20 ; and Bort van Arresten, 2, 4-6). A wife may also cause the arrest to be made in the name of her husband, without his knowledge or permission, and it will hold good if he does not afterwards dispute it (Berg. Ned. Adv. Bk., Vol. 4, Cons. 54).

Arrests are either civil or criminal ; but in this chapter I shall treat of arrests only in so far as they affect civil suits.

An arrest may be made (1) Of a person, or (2) Of his goods, as well as of a thing.

And first of the arrest of a person, which is divided into two kinds :

1. *In securitatem debiti*, and
2. *Jurisdictionis fundandæ causâ* (or *gratia*).

I. The *in securitatem debiti* arrest is very common, and is recognised also by the Roman law. It is used whenever a debtor is, *suspectus de fuga*, suspected of flight ; that is, whenever the debtor, who being under the same jurisdiction as the creditor, is suspected of leaving that jurisdiction, or country, for another, without having paid his debt to his creditor ; and this suspicion is confirmed if it can be proved that he either meditated flight at once, or that by words spoken or written by him, or by his acts and conduct, it can be reasonably inferred that he is preparing to leave the country. And in every case where there is a reasonable belief in the mind of the plaintiff, either by the actions, conduct, or expressions of the defendant, which could induce one to think that the latter contemplates leaving the Colony on a favourable opportunity, then the plaintiff is justified in issuing a writ of arrest ; as, for instance, where a debtor tells another, or it is discovered, that he intends to leave the Colony by a certain day, or shortly, or by a certain opportunity ; or if he takes his passage in a certain ship, or by a certain conveyance, whose destination is beyond the boundaries of the Colony (Van der Linden's Supplement to Voet, Bk. 2, Tit. 4, § 18 ; Van der Linden's Jud. Prac., Bk. 2, Tit. 18, § 1 ; Vroman de for. Comp., 1, 1, 25, and 3, 1, 20 ; Van Alphen's Pap., chap. 24 ; Voet, Buchanan's translation, 2, 4, 18-26).

It is not essential that the movements of the defendant should necessarily be secret, so as to come under the terms *suspectus de*

fugâ; he may openly avow his intention of leaving the Colony, and publicly make preparations for that purpose, yet if he fails to settle with his creditor a reasonable time before leaving, he may be arrested as a *suspectus de fugâ* (Merula Man. v. Proc., 4, 2, 25; Loenius, Dec. 48; Vroman 1, 1, 25). And it was held by the Supreme Court that the mere contemplated departure from the Colony of a debtor is sufficient to warrant an arrest; the departure need not be fraudulent, or to defeat the plaintiff's claim (*Roberts v. Tucker*, 3 Menz., 130); and also that one of two or more partners under the same jurisdiction, although contemplating only a temporary absence from the Colony, may be arrested to give security for the partnership debt (*Joseph v. Abrahams*, decided Supreme Court, 23rd July, 1864, not yet reported). These two decisions have of late been to some extent modified in the next four cases.

But though what has been said are the general principles upon which a plaintiff would be justified to arrest a defendant for suspicion of flight (see also the *The Master of the Supreme Court v. A.B.*, 3 Menz., p. 138), the Supreme Court have of late years also held that where the defendant could satisfy the Court that he was only leaving the Colony for a temporary purpose, and that he leaves considerable property in the Colony sufficient to meet the plaintiff's claim, he should not be arrested; or if arrested, should be discharged from arrest (*Van Blommestein v. Van Blommestein*, 1 Ford, 81; *Fraser v. Sivewright*, 3 Juta, 342; and *Harsant v. Pullinger*, Ibid 343); and carrying the same principle a little further, the same Court have also decided, on the application of the plaintiff that the defendant should give security for costs in a pending action, that though the defendant has no property to satisfy the plaintiff's claim, if he can satisfy the Court that his contemplated absence is only temporary, and *bonâ fide*, he cannot be arrested, nor called upon to give security. As this decision is a very important one, and is not yet reported, I give here the outline of the Chief Justice's judgment in the case I allude to, viz., that of *Lippert v. Adler*, decided 26th May, 1887. The Chief Justice said: "The mere fact that the defendant intended leaving the country was not, in his opinion, sufficient to justify the Court either in arresting him, or in ordering him to give security. No

doubt there is a rule in regard to plaintiffs who are foreigners, that they may be called upon to give security, but the same rule has never been applied to defendants, *unless there is reason to believe that the object of the departure was either to defeat or delay the plaintiff's claim.* In the consideration of that question it was an important ingredient whether the defendant had property in the Colony, and whether he was going away only temporarily. In the case of *Fraser v. Sitewright* and *Harsant v. Pullinger* those questions were considered, for they were important elements in the further consideration of the objects the defendants had in leaving. In the present case there was no evidence that the defendant possessed immovable property, but there was sufficient evidence before the Court that his departure was for a temporary purpose only, and inasmuch as the Court was satisfied that his departure was for a temporary purpose only, and that there was no intention of defeating or delaying the creditors, he did not come within the class of cases in which the defendant could be called upon to give security, he not being at all *in fugâ*."

It will be noticed, from what has been stated, what the grounds or reasons are which would justify a creditor to cause the arrest of his debtor, and that it is for the defendant to prove the exceptions here mentioned; for the plaintiff may not be aware, when he issued the writ, what defence the defendant may have to it, and therefore he would still be justified to issue it on complying with the 8th Rule of Court, because, as was remarked by the Court on another occasion and for another purpose in the case of *The Master of the Supreme Court v. A.B.* (3 Menz., 138), "that there was a great distinction in law between the facts, which it was sufficient for the plaintiff to allege on oath, in order to obtain a writ of arrest, and by the arrest to prevent the defendant's leaving the Colony before the Judges should have an opportunity of considering the merits of the arrest; and the facts which it was necessary for the plaintiff to establish to the satisfaction of the Judges, to prevent them from dissolving the arrest on the application of the defendant."

But of course if the plaintiff has full knowledge of the facts which the defendant may successfully set up, why he should not be arrested, or if arrested, discharged from the arrest, then he will not be justified to order the arrest of such a defendant; or of a

defendant of whose departure he is aware is only for a temporary and *bonâ fide* purpose, and without intending to defeat or delay his creditors; or who has sufficient property in the Colony to satisfy the debt.

But when a person owes a debt which he cannot possibly pay, then he cannot avail himself of any of these defences, and he is not, though he otherwise would be, privileged from arrest in arrestable causes (Van der Linden Jud. Prac., 2, 18, 1, and his Supplement to Voet, 2, 4, 18).

II. The *Jurisdictionis fundandæ causâ* arrest is the arrest of a stranger or foreigner, or of his goods, to found the jurisdiction of the Judge over him, or on them. And this kind of arrest has been mostly introduced for the purpose that the plaintiff may litigate at his own residence and there recover his debt from the peregrine (Voet 2, 8, 7). The Court of one country has no jurisdiction over a person in another country, but if the party comes within the jurisdiction of the Court, he may then be arrested so as to create or found the jurisdiction, and he must then be either imprisoned and abide the result of the action, or if he gives satisfactory security to abide by the result of the action, he is released from arrest; but the mere fact of the arrest, if legally made, founds the jurisdiction, and the jurisdiction once founded is as good as if the person had never been out of the jurisdiction of the Court. It is not required that the defendant should specially come to the same jurisdiction of the plaintiff in order to be arrested to found the jurisdiction, for this arrest may be made whether the defendant is only casually, or quite accidentally, within the jurisdiction of the plaintiff, but intends leaving it again shortly. If there is no intention to leave the jurisdiction shortly, and there is reasonable grounds of belief that the defendant intends to remain to answer and abide by the action to be instituted by the plaintiff, then no arrest is to be made, but the usual proceedings by summons are taken against the defendant. Of course if he attempts to leave before the case is finally settled, he may be arrested, and so may he arrest the plaintiff who intends to leave before the case is finally settled.

This kind of arrest is not so common or universal as the former; was not in force in the Roman law, and was introduced in Holland

in ancient days, and obtained the force of law by custom, for the better security and in favour of commerce, because the Dutch merchants would not transact business with those foreigners who could not be arrested merely because they were foreigners, if after making their purchases they leave without settling their accounts (Groenewegen ad. Cod., 3, 18; Peckins "Handopleggen en Besetten," cap. 1, No. 4, and cap. 35, Nos. 1 and 4; Merula 4, 2, 25; Voet 2, 8, 1, 2, 6 and 10; Bort 1, 16-21 and 2, 10; On "Jurisdiction" generally, see Story's "Conflict of Laws," chap. 14, §§ 530-583).

According to the usual rule of law no person can be sued but before his own Judge, *actor sequitur forum rei* (see chapter on "Actions.") But to this rule there is the exception in the arrest *jurisdictionis fundandæ causâ*: and this applies to whether the person of the debtor or his goods are detained (Merula 4, 2, 25, and notes; Bort 1, 1, 3, 5, and 3, 1, 3).

The arrest of goods, "to found jurisdiction," will be treated of at the end of this chapter. My object is first to treat of persons, both as regards giving security for a debt and to found jurisdiction.

Proceedings on arrest.—In Holland no writ of arrest can be issued without the authority of the Court. An arrest is looked upon as a very serious matter, especially the arrest of a person, who is thereby deprived of his liberty; and it was regarded also as a species of execution, and therefore the granting or withholding it was entirely in the discretion of the Court, according to the circumstances of each case. To obtain this order, a petition must be presented to the Court setting forth briefly the facts of the plaintiff's case, and stating the grounds on which he resorts to this extraordinary remedy, and the Court must be satisfied, from the facts laid before it, that the petitioner has a just cause for his application, and that the order for the arrest should be granted (Vromans 1, 1, 25, and 3, 1, 20, and notes by Middellant; Van der Linden Jud. Prac., 2, 18, 4; Bort on Arresten, 1, § 2, and 3, §§ 3-6, 17, 19, 22-27, and 30-34; Merula 4, 2, 25, 2; Peckins 2, §§ 4-6; Buchanan's Voet 2, 4, 18-26).

This law is in force also in this Colony except in so far as altered by our 8th Rule of Court. This alteration and the difference I shall presently point out.

In Holland, again, when a defendant has reason to believe that an application for his arrest might at any moment be made, he can forestall the plaintiff by presenting a petition to the Court for a Request "Antidotaal." In this petition he sets forth the grounds of his belief, or states certain facts, why he apprehends that the plaintiff intends to apply for his arrest, and concludes with a prayer "Antidotaal," that is, that the Court might declare that there exists no grounds for any arrest in so far as regards the claim, or demand, or complaint, of the plaintiff, and that the plaintiff's threat or intention to arrest is unfounded and unlawful, and that if he applies for an arrest it might not be granted. The plaintiff should have notice of this application, and the Court will decide on it in the same way as it would if the plaintiff had applied for the defendant's arrest, whether to grant or to refuse it (Van der Linden Jud. Prac., 2, 18, 5; Bort 1, 22; and Van Alphen's Pap., p. 677).

This law is also in force in this Colony, though I am not aware of any local decision on this point.

It might be asked, why should the defendant resort to this, what I take the liberty to call, "antidotal" or "protective" order, when he might either oppose the plaintiff's application for an arrest, or when the arrest is made, then to move, by anticipation, to have it set aside? The simple answer is that by the plaintiff delaying his application so long as he likes, he may very seriously inconvenience the defendant by moving the Court for his arrest; or under the 8th Rule of Court, arresting him at the last moment, whereby he may lose his passage, or the privilege of going by an early or a favourable opportunity, or suffer other loss and damage: and if the arrest should be afterwards confirmed by the Court, he has no remedy for compensation against his opponent. It is to prevent this loss, or damage, or disappointment, or uncertainty, that the "antidotal" or "protective" remedy is given to the defendant, by which he can have the plaintiff's right to arrest him at once established before it is too late.

Our Supreme Court has frequently decided that a plaintiff is not to act too hastily in causing the arrest of a person under the 8th Rule of Court (see also *Norden v. Sutherland*, 3 Menz., 133). He must wait until the defendant's departure is "imminent," and this must depend upon the circumstances of the contemplated

departure—how, and when, and by what opportunity. No definite time can be fixed. A fortnight before the time fixed for departure, when both parties are in the same place, and the final place of departure is there also, or within close proximity, is too soon. A day or two before is, under such circumstances, reasonable. It has also frequently happened that a plaintiff has no knowledge of his opponent's intended departure till within an hour or so of the time, when he has barely time to issue a writ of arrest, and that the arrest is made just as the Wednesday afternoon's mail steamer for Europe is leaving the docks; or it may be that the plaintiff purposely delays till the last moment in order to inconvenience and annoy the defendant as much as possible; or it may be, as most frequently happens, that the defendant, in the hope of escape, keeps out of the way till the steamer moves off, when he jumps on board and is at once arrested.

Now, all the disappointments can be prevented by the defendant's anticipating the move of the plaintiff, by applying for a protective or antidotal order.

When the plaintiff intends to apply to the Court for an order for an arrest, which he cannot take out under the 8th Rule of Court, he should give the defendant notice thereof; but instances might happen where this notice can either not be given, because the defendant secretes himself or his whereabouts is not exactly known, or there is no time to give him this notice before his departure; or for whatever other cause, then the Court may, on the *ex parte* application of the plaintiff, and if under the circumstances there is an immediate necessity, order the arrest of the defendant (Peckins 4, 5, and notes thereon; and *Van Blommestein v. Van Blommestein*, 1 Ford, 81).

Under the 8th Rule of Court, a writ of arrest may be issued without an order of Court, or of a Judge, and without notice to the defendant, provided it is only to "compel the appearance of the defendant to answer any claim or demand, and abide by the judgment of the Court therein, and provided also that the cause of action shall have originally amounted to the sum, or be of the value, of £15 or upwards, exclusive of any costs or charges, &c."

This Rule contemplates an arrest for only a "claim on demand" *due*, and thereby to initiate an action; and therefore for

whatever other cause, not included in this Rule, and for which we wish to arrest—as, for instance, where the debt is not yet due, or to stop the departure of a suitor in a pending action till security is given; or to stop the flight of an insolvent till his estate is liquidated, &c., we must follow the law of Holland, and obtain an order from the Court or a Judge to arrest.

A writ of arrest when once issued under the 8th Rule of Court, stands for a summons in the action, and no further or other arrests can be made in that cause without an order of a Judge; and so also has the Supreme Court decided that no writ can be issued under the 8th Rule of Court for the arrest of the defendant against whom a summons is in existence for the same cause or action, but the defendant can in such a case be arrested only on a writ issued by order of the Court or a Judge (*Van Blommestein v. Van Blommestein*, 1 Ford, 81; *Fraser v. Sivewright*, 3 Juta, 342; and *Harsant v. Pullinger*, Ibid, 343).

If, then, a plaintiff having an action pending wishes to arrest a defendant under the 8th Rule of Court, he must first withdraw the existing summons. But as he can gain no benefit by this step which he cannot get by an order from a Judge, he would act injudiciously in withdrawing the summons; unless, indeed, he can shew that the circumstances have so materially altered since the issuing of the summons and its withdrawal as to justify this step and the arrest.

It is worthy of note that until the decision of the four recent cases above mentioned, the first of them, *Van Blommestein's* in 1880, the same points therein decided seem never before to have been judicially mooted in this Colony; or if so, no decision was ever given thereon; and I well remember the argument and the judgment in the case of *Joseph v. Abrahams* in 1864, quoted above, and how the late Sir SYDNEY (then Mr. Justice) BELL, in concurring with the other judges in confirming the arrest, expressed his indignation and regret that he had to do so, inasmuch as it was alleged, and not denied, that the debt was a partnership debt; that the defendant intended to go to Europe only to buy goods for his firm, and that he would soon return, and that there was no question of the firm's stability. I do not remember all the authorities quoted in that case, but my impression is that the Court relied

chiefly on the 8th Rule of Court and *Roberts v. Tucker* (3 Menz., 130). And until the decision of especially the case of *Harsant v. Pullinger* in 1883, the profession always acted upon the decisions in *Joseph v. Abrahams* and *Roberts v. Tucker*. The decisions in the two cases just named are the more surprising when we bear in mind that the law of Holland on arrest was not done away with by the 8th Rule of Court, which practically merely facilitates the issuing of a writ of arrest for an action on claims or demands due, *without an order of the Court or a Judge*, and that it does not deprive a defendant of any of his common law rights or privileges in actions or defences on an arrest (what these are we shall see further on).

Of course the decisions in *Roberts v. Tucker* and in *Joseph v. Abrahams* have not been wholly over-ruled by those in the four recent cases above named, but only to the extent where the Court is satisfied that the defendant has goods, or his departure is only temporary and it is not to defeat his creditor.

It is surprising how many decisions have been given already on the interpretation of the 8th Rule of Court, and especially as to the practice to be observed thereon. Most of them have been on the ground of the irregularity of the initiatory affidavit. I shall here mention only the most important ones.

The affidavit on which the arrest is to be founded under the 8th Rule of Court, must be direct and positive; it must contain a true description of the person and place of abode of the party making it; a statement of the true sum due to the plaintiff, and must otherwise sufficiently set forth the cause of action; it must state also whether the plaintiff has any mortgage, pledge, or security for his demand; if he has any security, it should state the nature and extent of it, or that he has none adequate thereto; and when the claim is not for a positive sum due, as, for instance, where the demand is for unliquidated damages, as for libel, or slander, or for the unlawful detention of goods, &c., the affidavit should also state that the value in dispute between the plaintiff and the defendant is worth to the former at least £15, because no arrest can be made unless the claim amounts to £15 exclusive of costs; and that this sum, or for so much more thereof as may be awarded or found due to the plaintiff, remains wholly unsecured to him. The

affidavit should finally state the plaintiff's belief that the defendant is about to remove from the Colony, or is making preparations to leave it, and the grounds for such belief should also be stated.

This affidavit cannot be framed with too much care, for if it is in any respect irregular or informal, it is, with all the subsequent proceedings thereon, void *ab initio*; and it is right that this should be so, considering the great powers given to the plaintiff under the 8th Rule of Court. The plaintiff cannot by an affidavit, subsequent to the arrest, make good any defect, or supply any omission, in the affidavit on which the arrest was founded.

Thus an affidavit on which an arrest is to be founded must be direct and positive as to the defendant, and cannot be in the alternative, as, for instance, that an assault was committed by "one or other of them" (*Roberts v. Andrews and Tucker*, 3 Menz., 127).

It must be direct and positive also as to the cause of action, otherwise it will be void (*Thompson v. Andrews*, and *Norden v. Oppenheim*, 3 Menz., 128 and 141), and also as to the cause of action and the other particulars of the 8th Rule of Court (*Tets v. Davis*, Buch. Rep. for 1879, p. 76). It will be void also if it does not contain any description of the person or place of abode of the party who made it (*Smith v. David*, 1 Menz., 544). It must contain also evidence of an immediate departure (*Norden v. Sutherland*, 3 Menz., 133). It must contain the jurat, which if omitted is also fatal, with the arrest following (*Wilson v. Golding*, decided in the Supreme Court in 1854, but not yet reported). It must state accurately the grounds upon which the deponent founds his belief that the defendant is about to leave the Colony (*Dowse v. Irvine & Co.*, and *Hutzer v. Rogers*, 3 Buch. E.D.C., 184 and 400). It must otherwise be good in itself, and if bad, the writ will fall with it (*Spiegel v. Eisenbach & Co.*, 1 Juta, 226).

The affidavit may be sworn to by one of several plaintiffs who has knowledge of the facts; or in the case of a partnership, by a member of the firm, on behalf of the firm.

The affidavit may be made also by the agent of the plaintiff, but if so, the information required must be within the knowledge of the agent himself (*Tets v. Davis*, Buch. Rep. for 1879, p. 76).

And where the plaintiff sues in his representative capacity as executor, or trustee, or agent, &c., it shall be sufficient if he states

in the affidavit that the defendant is indebted to his principal, or the estate he represents, in the sum he claims, as appears from the books in his custody, and that he verily believes the books to be correct.

If the party who has knowledge of the debt cannot also, of his own knowledge, swear to the defendant's meditated flight, then any person who has knowledge of it can make the affidavit; or there may be several affidavits, provided they are not made to run up unnecessary costs, but only to supply what one or other of the deponents could not definitely swear to, and in order to comply fully and satisfactorily with the requirements of the 8th Rule of Court.

An affidavit intended for a Circuit Court arrest must be in the same form as one of the Supreme Court (Rule 165).

If an affidavit is deficient in any one of the essential requisites hereinbefore mentioned, it will be void and be set aside with all the subsequent proceedings thereon; but of course there is nothing to prevent a proper affidavit from being filed, and to begin the proceedings *de novo* and re-arrest the defendant (*Roberts v. Tucker*, 3 Menz., 130),

Until the passing of the Act 41 of 1882, there was no means of making an affidavit to arrest on information contained in a telegram, unconfirmed by any other direct evidence. But by virtue of the fourth paragraph of that Act, the 373rd Rule of Court was framed, and under that Rule the affidavit to arrest, if lodged with the Magistrate of the District where the plaintiff or his agent resides, other than the districts of the Cape, Albany, or Kimberley, must be telegraphed by that Magistrate to the Registrar of the Court, who upon receipt of such telegram can allow the writ to be issued by the plaintiff's attorney, while the Magistrate must, by the first post, forward the original affidavit.

Any plaintiff not fully complying with this Rule cannot have his telegram affidavit received in any other form, or through any other channel, as this Rule was framed specially to meet the case of an application under the 8th Rule (*Jackson v. Somerville*, 4 Juta, 158).

With the affidavit on which to found the arrest, must be filed a warrant, or authority, of the plaintiff to his attorney to sue. If

this is not done, the process cannot issue (*Gertenbach & Bellew v. Mosenthal*, Buch. 1874, p. 85).

It is not necessary, though advisable, that the power should contain the name of the party against whom the writ is to be issued, as the affidavit identifies the party (*Roberts v. Tucker*, 3 Menz., 130). But the power should be signed by all the plaintiffs, and cannot be signed by one "for self and co-trustee" (*Trustees of Dodds, King & Co. v. Watson*, 1 Menz., 140; *Western Province Mining Company v. Thorpe*, 2 Searle, 246; *Walker & Co. v. Beeton's Trustees*, Buch. 1868, p. 225, and 1869, p. 38).

Of course any partner, having authority, can sign the firm's name. The power will, however, be void if signed by one partner in the name of the firm after the dissolution of the partnership, unless specially authorised by the deed of dissolution (*Kilian & Stein v. Norden, Executor of Horn*, 3 Menz., 530).

If the power is lodged with the Magistrate of the district in cases where it is required under the 373rd Rule, then the Magistrate, in telegraphing the affidavit to the Registrar, should state also who is authorised in the power to issue the writ on plaintiff's behalf, and he must send the power, with the affidavit, by the first post.

C. H. VAN ZYL.

(To be continued).

NOTES ON SOME CONTROVERTED POINTS OF LAW.

I.—THE CESSION AND SUB-LETTING OF PRÆDIA RUSTICA.

May a lessee of lands sublet or make over the lease of such lands without consent of the lessor?

ANSWERED AFFIRMATIVELY—*Eckhart v. Nolte* (Supreme Court, Transvaal; *Cape Law Journal*, Vol. III., p. 43).

ANSWERED NEGATIVELY—*De Vries v. Alexander* (Foord's Reports, p. 43); *Swarts v. Landmark* (Juta II., p. 5); *Friedlander v. Croxford and Rhodes* (E. D. Court, 15th November, 1867, newspaper report); *Visser v. London Diamond Mining Company* (Orange

Free State High Court, *Cape Law Journal*, Vol. II., p. 341; *Green v. Griffiths*, *Juta IV.*, p. 350).

The controversy in this case relates to the interpretation of the ninth section of the Placaat promulgated by the States of Holland and West Friesland on the 26th of September, 1658, which section may be translated as follows:—“ And no tenants or lessees shall, either pending and during the lease, or after the expiration thereof, make over, directly or indirectly, such lease or meliorations of lands, by sale, exchange, donation, or other contracts, without previous written consent of the owner, on pain not only of nullity, but also that such tenants and lessees shall forfeit in favour of the owner, both the further lease of lands, should he” (*sic*) “ have any such, and besides such action for compensation as may in any way belong to them; and that in addition thereto, such contracting parties shall incur a penalty amounting to the sum for which they have contracted with each other.”

In 1696 this Placaat was re-enacted in precisely the same words. The main question now is whether the words “ such lease ” (*zoodanige huyre*) must be taken in their ordinary sense; or whether, as has been decided by the Supreme Court of the Transvaal, they must be taken as equivalent to the words “ such after-lease ” (*na-huyre*), previous sections of these Placaats treating of such “ after-leases.”

It must be premised that it may be taken for granted that the two previous legislative enactments of the years 1515 and 1580, to which reference will again be made in these pages, do not concern the present question. Moreover, it is to be observed that on the 16th February, 1618 the States of Zealand promulgated a Placaat (Groot Placaat-Boek, Vol. I., p. 366), Section 3 of which corresponds almost literally with Section 9 of the Placaats of the States of Holland and West Friesland of 1658 and 1696. This Placaat was repeated on 26th January, 1664 (Groot Placaat-Boek, IV., p. 1035. The Zealand Placaats differ from those of Holland and West Friesland in these respects, amongst others, that the words “ or before ” occur before the words “ or after the expiration thereof; ” that instead of the words “ should he have any such ” the words “ should they have any such ” are used; and that Section 3 of the former Placaats ends with these clauses, which are omitted in the

latter: " Provided that the lessee, who is owner of a farm and farmhouse, if he should happen to sell or transfer the same, shall be entitled to make over the lands which he has in lease (? *baning*) for the time that his lease is still to continue, remaining, however, responsible for the rent, provided also that the lessees shall be allowed to make over to others the land leased or part thereof at the utmost for one or two seasons to depasture the aftergrass (? *etten*), cultivate flax, madder or anything else, remaining also responsible as before-mentioned." It seems evident that the ninth Section of the Placaat of 1658 was simply taken over, with certain alterations and omissions, from the third section of the Zealand Placaat of 1618; the word " he " having through inadvertence or otherwise been substituted for the word ' they. ' ⁽¹⁾ The omission in the Placaat of 1658 of the clauses which occur at the end of the third section of the Zealand Placaat, allowing the lessee to grant certain rights to others under certain circumstances for a limited period, notwithstanding the tenor of the first part of the third section, is a noteworthy fact.

It is quite possible that the ninth section of the Placaat of 1658 could have been more carefully and skilfully drafted; nevertheless its meaning seems reasonably clear. It provides in effect that no lessee or tenant shall during the continuance of the lease have the right to make over the lease to others; or after the expiration thereof to make over the so-called meliorations, without the consent of the lessor given in writing. This seems to be the most natural interpretation, and it is that which is supported by the best authorities; besides being that which has been almost generally accepted throughout South Africa.

The first authority we shall refer to on this subject is Neostadius (*Decis. Supr. Cur. Holl., Zeel. et Westfris., No. 31*). This writer, whose decisions seem to have been first published in 1655, was one of the members of the Supreme Court of Holland, Zealand and Westfriesland. He states generally that the provisions of the Roman Law, by which sub-leases of lands were freely allowed, had

(¹) The Placaat of 1618 speaks of *owners* and *they*: that of 1658 of *owner* and *he*. Possibly the draftsman of the latter Placaat understood the pronoun *they* to relate to *owners*; so that when in the latter Placaat the singular *owner* was used, the pronoun also became singular. If he was right it would be difficult to understand the meaning of the passage in which these words occur.

been abrogated by Placaat, without mentioning however which Placaat, or stating the case in which the decision had been given. As however the Placaat of 1658 had not yet then been enacted or promulgated, it may be safely assumed that a Zealand case was here referred to, and that he intends to allude to the Zealand Placaat of 1618, although no mention is made of the saving clauses at the end of the third section. Anyhow, Neostadius was, as a member of that Court, probably well acquainted with the provisions of the Placaat of 1618. If these suppositions be correct, considerable light is thrown upon the true interpretation of the Placaat of 1658.

Next we have the authority of Voet (19, 2, 5) for the view that the Roman Law had been abrogated by local enactment; although he, probably through inadvertence, cites the Placaats of 1515 and 1580, besides the decision reported by Neostadius, and makes no mention of the Placaats of 1658 and 1696. Voet is cited and followed by several other writers (*e.g.*, Zurck, *Codex Batav.*, sub. voc. "Huur," I.; Schomaker, *Consult. III.*, cons. 77, n. 18).

Then there is in support of the same view the eminent authority of Van der Keessel, to be found in his *Theses Selectae* (Thes. 674). And in the case of *Friedlander v. Croxford and Rhodes*, Judge DENYSSEN, in giving judgment, remarked: "Van der Keessel referring to this matter in his *Dictata*, says: 'Regula tamen haec de sublocatione in praediis rusticis conductis in Hollandia, post Grotii aetatem mutata est lege 26 Septembris, anno 1658, renovata anno 1696, art. 9; quâ ordines Hollandiae constituerunt ut non liceret colonis, sive durante sive etiam finita locatione, vel locationem suam vel etiam meliorationes quas in praedio conducto fecerunt, in alios quocunque titulo transferre sine scripto domini consensu, sub poena nullitatis atque amittendae locationis adhuc durantis atque juris repetundi impensus meliorationis.'"⁽²⁾ This undoubtedly shews that Van der Keessel must have studied the Placaat with some attention.

Various authorities have been adduced to support the opposite view. It will be seen, however, that the amount of support they

(2) Van der Keessel seems to consider that the words, "further lease, should he have any," mean the unexpired term of the lease, should any part of it be yet so unexpired. In section 1 of the Placaat of 1618 the words "na-huyre, ofte verdere pacht," are used. May not "verdere huyre" or "verdere pacht" refer to a conventional, and "na-huyre" to a supposed legal right of "naasting." "Huyre ofte Beterschap" may possibly have been intended to include also "na-huyre."

give to it is not very great. Grotius, as is remarked by Van der Keessel, wrote before the passing of these Placaats, and of course does not refer to them. The same remark applies to Groenewegen. The opinion of Le Cocq, to be found in the Dutch Consultations (II., Cons. 200) was probably given about 1599, as we find that another opinion of his (II., Cons. 158) was given by him in that year; and thus it cannot refer to these Placaats either.

Van Hasselt (II., p. 192), in his annotations on the first-mentioned opinion of Le Cocq's, remarks that Pape in his notes on Dutch Consultations observes that *hodie quomodo Grotius docet* a lessee could validly sublet to another if there was no agreement to the contrary; Van Hasselt therefore does not give an opinion of his own on the law as it stood in his own time, but merely refers to the opinion of Pape, who again only relates what the law was in the time of Grotius. With reference to the case of *Hendrick Hendricks v. Philips van Zeelandt* decided 25 March 1616 (Holl. Cons. III append p. 47 and VI append. p. 333) it has been argued that there the Court solemnly enquired whether the express stipulation by the lessor that the lessee should not cede his lease was valid and binding or not, which would have been quite useless if a lessee could not cede his lease or sublet without consent of the owner (*Cape Law Journal* Vol. III., p. 173). But it must not be overlooked that in that case it was part of the agreement that in case of a sublease the lessee should not only forfeit his lease, but also pay a double rent; and the main point at issue had reference to this question of double rent. The case is really not applicable, for another reason also, that it was decided before 1658; the same points however were similarly raised and decided more than once after the enactment of the Placaats of 1658 and 1696; for instance in 1741 and 1742 (Bynkershoek, *Quest. Jur. Priv.*, II., xiv, p. 326). Lybrechts who wrote after 1658, has also been quoted as an authority for the view of the Transvaal Court. But Lybrechts, who was a writer on Notarial Practice, is really not an authority of any note, having been more of a compiler than of an original writer; and frequently he simply follows Grotius, who cannot be quoted on this subject. Wassenaar, who also wrote on Judicial and Notarial Practice, makes no mention of the abrogation of the Roman Law with reference to this matter. Van

Leeuwen, a writer on the substantive Roman Dutch Law, referring to the Placaat of 1658, merely states that further provisions are made therein, without mentioning what those provisions are⁽³⁾. With reference however to the three last named writers it may be remarked that they do not expressly state that the provisions of the Roman Law had been altered by local enactment, and that they in fact do not give any explanation whatever of section 9 of the Placaat of 1658, cannot surely outweigh the positive declarations of such eminent authorities as Voet and Van der Keessel, or prove that the Roman Law had not been altered. However this may be, no jurist (so far as we are aware) has ever given to the ninth section of the Placaats of 1658 and 1696 that interpretation which has been put upon it in the case of *Eckhart v. Nolte*. On the whole, therefore, looking at the words of the Placaats themselves, looking at the source whence they were derived, and looking at the interpretation given to them by all jurists who, before that case was decided, have ever attempted to interpret them, there can be no reasonable doubt that the law on the subject of subleases of land is such as it has been held to be by the majority of the superior Courts in South Africa.

II.—THE RECOVERY OF THINGS STOLEN, AND SOLD IN MARKET OVERT.

Is the owner of cattle, stolen from him and sold in market overt, entitled to vindication of such cattle, without repaying to the purchaser the price paid by him for the cattle?

ANSWERED AFFIRMATIVELY—*Van der Merwe v. Webb* (3 Buch. E.D.C. Rep., p. 97).

ANSWERED NEGATIVELY—*Retief v. Hammerslach* (Transvaal High Court, *Cape Law Journal*, Vol. 1., p. 346).

By the Roman law the owner of stolen goods could follow them up everywhere, and reclaim them from even a *bonâ fide* purchaser for value, without restitution of the price paid for such goods. In

⁽³⁾ Van Leeuwen, eminent jurist though he was, occasionally makes a slip, just like others. Compare, for instance, what he said in his *Censura Forensis* I., Lib. 4, Cap. 7. § 15, with what he laid down in his *Roomsch-Hollandsch Recht* (IV., xiii., 4), published later.

Holland the same rule was established by law, with this proviso that the owner should not be entitled to retake his property by his own private authority (Groot Privilegie of Mary of Burgundy, 14th March, 1476, section 44; Groot Placaat-Boek, II., p. 658; Matthaeus over de Opveilingen 1, 6, 7, Translator's Note g, p. 56, and 1, 11, 71, Translator's Note, II, p. 274; Zurek Codex Batav. sub. voc. "Dieven," § 23; Rechtsgel. Obs. II., xxvii; Loenius Cas. 27, note 1, p. 222, &c.) It has, however, been laid down by Grotius (2, 3, 6) in general terms that where a person has bought anything *bonâ fide* on a free market (*vrije-markt*) the true owner may recover the stolen article on repayment to the purchaser of the price he has paid for it, *if the purchaser cannot recover such price from the seller*; whilst Van der Keessel (who was evidently followed in *Retief v. Hammerslach*) apparently goes somewhat further, inasmuch as he omits the proviso laid down by Grotius in the words "if he cannot recover such price from the seller" (Thesis 184). Much reliance has been placed upon these authorities by those who have held that the owner is not entitled to free recovery of his property when it has been sold in market overt.

It is obvious that to support any doctrine of law it is not always enough to cite authorities; but that it may be necessary to test their accuracy by reference to the legal enactments or proved customs on which they rely in advancing any such doctrine. It will therefore be necessary to investigate the grounds on which Grotius, Van der Keessel and other writers who have been quoted as proving that a departure from the Roman Law, and the General Law of Holland had been effected, found their statements.

Before going further it may be necessary to premise that in Holland and the Netherlands generally every city of any importance rejoiced in its own special privileges, charters, and customs. In the Hague and in Dordrecht, for instance, no vindication of stolen property sold in market overt was at all allowed; though this was undoubtedly an infringement of the common law. In other cities the law either as laid down by Grotius or as laid down by Van der Keessel prevailed; in others, again, apparently the common law was applied (*vide e.g.*, Matthaeus de Auction. 1, 11, 70; Matthaeus Paroemiae 7, n. 17, p. 235; Zurek, Codex Batav. sub voc. "Goederen," § 3; Rechtsgel. Observ. loc. cit., &c.). And it seems

clear that from such divergent customs and laws of particular places and cities no general law can be made up (Van der Keessel, Thesis 14).

With regard to the passage cited from Grotius above, the first question that arises is, What is a free market? In Zurek's Codex Batavus. (sub voc. "Kermis," § II., n. 1), this remark occurs: "Grotius makes this applicable in all places where free market (*vrije-markt*) is held as is implied by the words themselves" (*als vloeiende zulks uit de woorden zelfs*). "So it was decided in the case of *Willem Post v. C. van Buren*, by judgment of the Court of 26 January, 1674." (To this case we shall have occasion to refer later on again). Moreover, we find that Voet in the Summaries prefixed to every title of his Commentaries, invariably, whenever he alludes to this subject, uses the expression *nundinae publicae privilegiatae* (6, 1, 8, 14, 15; 50, 11, 2; cf. Huber Hedend. Rechtsg., 6, 11, 12; Utrechts. Cons., 2, 14, 10, 11, 12, &c.) Huber makes an express distinction between free markets, which enjoy certain privileges, and markets established by municipal and similar bodies (*Hedendaagsche Rechtsgeleerdheid*, 3, 3, 38). A free market is therefore nothing more than a market endowed with certain privileges. But supposing that we must understand Grotius as referring to goods sold "in market overt" (as it is translated by Mr. Maasdoorp). Well then it cannot be overlooked that Grotius wrote his remarkable work whilst confined in the Castle of Levenstein, and debarred from access to authorities; so that with the vast acquaintance with the local laws and placats of different places in Holland of which he so constantly affords us evidence in his work, nothing is more natural than that he might have laid down as a general rule of law what was only law in particular places. In fact, Groenewegen (who himself has been accused by Bijkershoek and others of too readily holding that the Roman law had been abrogated in Holland by virtue of special customs) in his Annotations on Grotius, makes the following pertinent remark on the passage cited above: "According to the *Keur* of Zealand and the custom of some other places; but this does not hold where such *Keuren* or customs do not exist" (note 13). So also the learned translator of Matthaeus de Auctionibus says: "For besides that, this is a special privilege granted contrary to the

common law, which, so far from being extended to other cases, ought itself to be interpreted as narrowly as possible; wherefore also juristic writers are unanimous on this point that this doctrine of law is nowhere else in force than in such places alone where they have been established by express charters" (Matthaeus over de Opveilingen, I., note 11, p. 281). It seems unnecessary to cite more authorities in support of the views expressed by these writers that these local privileges cannot constitute a general law; a fact which has apparently not been regarded by those who lay down the law in more general terms.

As regards the passage cited from Van der Keessel's *Theses Selectae*, it appears that that writer relies entirely on a decision of the Court of Holland reported in the *Bellum Juridicum* (*Willem Post v. C. Van Buren*, cas. 1, p. 3). Now, however, eminent an authority Van der Keessel may be, it seems almost marvellous that so important a doctrine should have been laid down by him and others on the strength of a decision of which so very little is known. It appears that some stolen cattle had been sold on the market at Gonda; and that the owner claimed restitution thereof without repaying the price to the purchaser; and that the Court gave judgment against plaintiff, "for reasons moving them thereto," each party to pay his own costs. Two opinions of Counsel are also given, one in favour of plaintiff, the other against him. In the opinion against plaintiff Counsel rely upon Grotius (*loc. cit.*) and Groenewegen (*Leg. Abrog. ad. Cod.* 6, 2, 2) and decides against him on the ground that by the law of various places the owner is not entitled to free restitution of his property. Whatever may be the value of this opinion, the grounds upon which it was given are certainly very inadequate. And as the reasons for the decision of the Court are not given, may we not assume that it was proved to the satisfaction of the Court that by the special laws and usages of Gonda, sales on market overt were privileged; in which case the decision would only amount to this that the public market at Gonda was such a privileged one as is spoken of by Voet and others? It is an undoubted fact that Gonda had its own special laws and customs; and the fact that in the case just mentioned the Burgomaster and Municipal authorities of that town joined themselves as co-defendants, seems to lend some probability to this

view. The decision related either only to a local question, in which case it would not be of general application; or it related to the general law regarding *free markets*, in which case it would not apply to unprivileged public markets generally. In fact, according to the writer in *Zurek Codex Batavus* (sub. voc. "Kermis") and the first opinion given in the *Bellum Juridicum*, it would appear that the question actually had reference to a free-market. But supposing a free-market to be simply a public market, where is the law that would have justified the decision of the Court?

It may be incidentally remarked that the Court of Holland was not one of supreme jurisdiction, and that in fact we find that three out of the four of its decisions bearing on the subject of *rei-vindicatio* reported by Neostadius, were overruled in appeal. This case seems to afford but a slight foundation for the fabric raised upon it by later writers, whom Van der Keessel follows.

Some writers go so far as to hold that by analogy of law goods sold in a public shop or market where such goods are generally exposed for sale (*in taberna publica vel in foro, ubi res ejusmodi vulgo vendi solent*) cannot be reclaimed by Roman Law from a *bonâ fide* purchaser without restitution of the price (Van Leeuwen, *Corpus Juris*, notae ad Cod. 6, 2, 2; cf. *Utrechts Cons.* 14, 36, n. 6.) The passage from the Digest which they quote in favour of this view hardly supports the same. In his *Censura Forensis* again Van Leeuwen speaks of goods sold *in publico emporio* (1, 2, 11, 4) for cash (1, 4, 19, 20) not being liable to free reclamation, relying upon authorities who (as far as we have been able to consult them) only refer to the laws of particular places.

In connection with this subject the modern law maxim *mobilia non habent sequelam* is sometimes appealed to by those who would hold that the strict rule of the Roman Law has been modified by usage. But this maxim is somewhat too general in its terms. Matthaeus, who devotes a chapter to it (*Paroemiae*, Cap. VII, p. 216) gives so many exceptions to the rule as to restrict its application considerably; and Voet applies it to the matter of *Reivindicatio* only twice (so far as we are aware); once quite unnecessarily (14, 3, 4); and once, we venture to think, without any good grounds (36, 1, 6, 4; cf. 6, 1, 12). All other Roman-Dutch law authorities we have had the opportunity of consulting limit the

maxim (so far as it relates to private laws) to the case of goods given in pledge; (Van den Berg, Ned. advysb. I., Cons. 223, p. 494; Van der Keessel, Thes. 432; P. Voet, de mobil. et. immob. natura, Cap IX, § 8, p. 204; Grotius 2, 48, 29; Matthaeus de Auct. 1, 11, 70 *vs.* "nec obesse putat;" Matthaeus over de Opv. note II, loc. cit. p. 274; Van Leeuwen Cens. Forens. 1, 4, 7, 6, &c.; and thus the rule has been laid down as *mobilia non habent sequelam hypothecae* or *per hypothecam*. (Grotius in Holl. Cons. III, B, Cas. 174, n. 3, p. 466; Loenius Decis. 50, p. 314 & 324; Bort. Nagelatene Werken 2, 9, obs. 2, p. 113; Schomaker Consil. III Cons. 20, n. 3 & 8; Cons. 21, n. 3; Cons. 22, n. 15) or as it is expressed in the Code Napoleon (*Art.* 2119) *Les Meubles n'ont pas de suite par hypothèque*. Even the rule thus laid down must be understood to refer not to the disposal of the goods pledged by the creditor who is in possession of them, but to the case where such goods have been pledged to one creditor without delivery, and then again pledged and delivered to a second creditor. *Paroemia illa juris Hollandici ex veriore sententia inhihet tantum hypothecariam actionem; minime vero obstat domino rem suam mobilem vindicanti a quovis possessore* (Beucker, Decis. Irisic. Cap. 229, note, p. 261.) It is clear therefore that the maxim *mobilia non habent sequelam* affords no grounds for the view contrary to the principles of the Roman Law.

When a rule of law is doubtful it is often found convenient in the Cape Colony to refer to the law of England, from which inferences may be drawn by way of analogy. The English law relating to markets overt is well-known. In the United States of America, where the law of England was imported, it has often been held, on the principles of the English law itself, that the doctrine of market overt does not apply, inasmuch as it depended upon local English custom. If this view be a correct one, with how much greater force can it be said that the special local customs of particular places and cities in Holland have not force of law in South Africa. The principles laid down in *Van der Merwe v. Webb* therefore do not seem to be open to doubt or dispute.

In confirmation of the views expressed above, it may be mentioned that at Groningen a free market was established, the time of duration of which was fixed in 1522, and afterwards again in

1609. These free markets were distinguished from other yearly markets (*jaarmarkten*), and also from the weekly markets (*weekmarkten*) which were afterwards established, by their enjoying the privilege of *vrijheit van de marcte*; the chief feature of which was that during the time that these markets were being held, no person entering into the town was liable to arrest (*Stadboek van Groningen*, IX., Art. 24 and 45, and notes thereon, pp. 157 and 301; in Vol. V. of the "*Verhandelingen te Nasporing der wetten en Gesteldheid onzes Vaderland.*" Groningen: W. Zuidema. 1828.)

M.

SIR HENRY MAINE.

It would indeed be an unpardonable omission—in the phrase of Dante, *un gran rifiuto*—if in these pages no mention were to be made, and no sense expressed, of the heavy loss which, in the passing away of Sir Henry Maine, has been sustained by the science of law. Not law alone indeed, but literature at large, has to mourn for one of its master spirits—one of whom to say *nihil tetigit quod non ornavit* would be in truth an imperfect eulogy; for, graceful as was the form of all he wrote, that grace was but as the artistic setting is to the gem, or as the adornment of the façade is to the noble architecture of some stately house. It was by the combination of systematic research with a just critical instinct—an almost intuitive perception and faculty of appreciation, which enabled him to disencumber the precious ore from the surrounding dross—that Sir H. Maine was enabled, it might almost be said, to create the science of comparative jurisprudence. By his singular skill in exposition he made the dry bones to live; his wide and varied experience, as a public servant, in matters connected with Indian administration, enormously increased the value of the literary labours which he simultaneously pursued; and even those who have most keenly contested some of his conclusions could not fail to acknowledge their deep obligation to his method. By his writings a whole generation of students and scholars has already been profoundly influenced, and their spirit has permeated the mental attitude of every subsequent labourer in the same field.

Among the literary productions of the present age which are destined to be permanent, no competent authority would reject the claim of "Ancient Law." Almost synchronous in publication with the "Origin of Species," its conception is at root the same; and those who regard the theory of evolution as perhaps the greatest discovery of the nineteenth century will be disposed to hold that Maine, in his application of that theory to political philosophy and the history of institutions, performed a service which in a different sphere was scarcely less considerable than that for which disciples as yet unborn will pay honour to the name of Darwin.

Sir Henry Maine started in life with no special advantages. The son of a country doctor, he was educated neither at a fashionable school nor at a fashionable college. He became what used to be known as "a blue-coat boy," and doubtless attained distinction as a "Grecian." From Christ's Hospital he proceeded to Pembroke College at Cambridge, a college which, although till recently small in numbers, can boast of several famous names in the roll of its *alumni*, such as Spenser and Gray among the poets and Pitt among the statesmen. In Maine's freshman's year, Professor Stokes, now member for the University, graduated from Pembroke as Senior Wrangler, another member of the college obtaining the third place in the same Tripos. So many high degrees had been taken from the same college about this time that when Maine graduated a strange thing happened. His undergraduate career had been one of rare brilliancy. After obtaining the Chancellor's Medal for English poetry, in two successive years he divided with Mr. W. G. Clark—afterwards Public Orator of the University and Editor of Shakespeare—the coveted honours of the Browne Medals for Greek and Latin Odes and Epigrams. Elected Craven Scholar in 1843, in 1844 he took his degree as Senior Classic and First Medallist, Mr. Clark occupying the second place. Among classical men at Cambridge there is still preserved and handed down the "copy" of verses—a translation from Kirke White into Latin Elegiacs—which Maine wrote in the Senate House in the Tripos of 1844. The strange thing to which I have referred was that all this distinction failed to secure a fellowship at a small college! At Pembroke there was no vacancy, and the custom at

Cambridge, unlike the more eclectic fashion which finds favour at Oxford, is for each college to choose its Fellows from among its own scholars. It was felt, however, that for a career which had opened with such promise the University must find a place, and before long the position was offered and accepted of Tutor of Trinity Hall, of which college, always specially and honourably connected with legal studies, he was destined in the process of time to become the Master. In 1847, when barely of master's standing, Mr. Maine was appointed Regius Professor of Civil Law. In that position he succeeded Mr. Geldart, whose death it was that, thirty years afterwards, caused the vacancy in the Mastership of the Hall which, as already mentioned, Sir Henry Maine was called upon to fill.

It would be out of place to here attempt an outline of the biography of the eminent man whom we have lost. Such an attempt could amount to little more than a repetition of what has been elsewhere set forth from more abundant material by abler pens. Of his appointment as Regius Professor, which may be described as the earliest among many recognitions of the singular breadth of his capacity, he is said to have himself stated that he was impelled to the study of the civil law by his obligation to expound it. It was not, however, till some years later, when he had exchanged his Cambridge position for that of Reader in Jurisprudence at the Middle Temple, having previously been called to the Bar, that the first fruits of his juristic labours were published in the form of an Essay on "Roman Law and Legal Education." This essay, which has been re-published in the third edition of "Village Communities," is as well deserving of perusal to-day as when it first appeared. It did much to foster the revival among English lawyers of studies for the neglect of which they had been too long and justly blamed; it indicated the standpoint from which they should be approached, and set forth some of the reasons which render so imperative their claim upon the attention, not merely of the theoretical jurist, but of the "practical lawyer," the diplomatist and the statesman. Of the enduring value and interest of this essay, especially to the lawyer in a colony like the Cape, where the civil law forms the basis of our jurisprudence, it would be difficult to speak too highly; it should be classed among

those literary productions which, as Pliny said of his favourite books, are *non legendi sed lectitandi*.

Five years after the publication of this Essay, "Ancient Law" was given to the world. In the following year, its author accepted the distinguished and responsible position of Legal Member of the Council of the Viceroy of India. It was while holding this post that he acquired much of that knowledge as to laws and customs, tenures and institutions, which stimulated and guided his later investigations into the history and social polity of the Aryan race. In a letter now before me, which he addressed to me some years ago, in the course of a discussion of a vexed point of archaic law, as represented in the Iliad, he referred in illustration of his argument to the fact that "an Indian Village would certainly receive a judicial declaration by the Elders with acclamation." The Viceroyalty of Lord Lawrence was signalised by the reforms in Indian land tenure which were effected by his government, doubtless under the guidance and in accordance with the views of its legal member. It has been said that Lord Lawrence declared that in the course of his official experience he had known no more remarkable state-papers than some of the minutes which Maine submitted to the Council. Not long after his return from India he was appointed a member of the Council of the Secretary of State, in which position he continued to render services, the value of which only his colleagues could fully appreciate, for the remainder of his life. He was one of those men who deeply impressed all with whom he was brought into contact. So high indeed was the opinion which, by the most competent judges, was formed of his capacity that, many and dignified as were the posts which he accepted, they were perhaps less numerous than those which were pressed upon him in vain. Lord Cross, when Home Secretary, offered him the responsible position of Permanent Under Secretary at the Home Office; and on the retirement of Sir Erskine May it is understood that Mr. Gladstone placed at his disposal the important office in the House of Commons which that great authority on constitutional law and parliamentary practice had so long adorned.

In the course of his career Sir Henry Maine became officially connected with at least four great Universities. His academical novitiate, as already stated, included the tenure at Cambridge of

the Regius Professorship. Among the incidents of his labours in the East, not the least interesting was the preparation of three characteristic and most appropriate addresses which he delivered in his capacity of Vice-Chancellor of the University of Calcutta. They have since been published, and among such *prolusiones* we may well exclaim *O si sic omnia!* After his return to England he became an active member of the Senate of the University of London; while at Oxford the Corpus Professorship of Jurisprudence is said to have been created, mainly in order that he might be the first Professor. From Oxford he returned once more to his own University as Master of Trinity Hall; and it was only a few months ago that he succeeded Sir William Harcourt as the Whewell Professor of International Law. The circumstances of these last elections were somewhat curious. On the vacancy occurring at Trinity Hall, the Fellows, with whom the choice of a successor to Dr. Geldart lay, were unable to decide between the claims of Mr. Latham, the popular Tutor and senior Fellow of the College, and those of Professor Fawcett, whose public career had reflected a lustre on the Society of which he was a member. The difficulty was solved by the unanimous selection of Sir Henry Maine. Similarly, when Sir William Harcourt resigned, the appointment to the Whewell Professorship was supposed to lie between Mr. Westlake, Q.C., one of the ablest living exponents of certain branches of International Law, and Mr. T. J. Lawrence, who had for some time done excellent work as Sir William's Deputy. The electors again found a way out of the dilemma by postponing the competing claims of others to those of one whose pre-eminence was unquestionable, but who had not been understood to be a candidate for the post. The few lectures Sir Henry delivered since his election I learn from private letters to have been considered somewhat disappointing. From an average Professor they would probably have been regarded as remarkable; but he was one from whose many talents much would be required, neither can it be doubted that, had he been spared, he would not have fallen below the high standard of performance he had himself created. The subject was a congenial one, and it is understood that he was about to resign his seat at the India Council in order to devote a larger portion of his time to its exposition. It is mainly to his tenure

of the Corpus Professorship that we owe the invaluable series of publications—"Village Communities," "The Early History of Institutions," and "Early Law and Custom"—by which the reputation created by "Ancient Law" was consolidated and enhanced. Had fate permitted, his tenure of the Whewell Chair could scarcely have failed to be equally productive of something which would have added to the sum of human knowledge. In one respect, his experience was more fortunate than that of many authors successful in their prime, whose later works have been received with indifference by a public whose taste they no longer satisfied. His most recent book, that on "Popular Government," was the most widely read and eagerly discussed, not only in England but on the Continent and in the United States, of all his publications. Of this book, as of "Early Law and Custom," this *Journal* endeavoured, at the time of their appearance, to give its readers some account;⁽¹⁾ and although the critic, in dealing with "Popular Government," was fain to dissent from some of the arguments and conclusions of the writer, it is hoped that full justice was done to the conspicuous ability and far-reaching interest of the work. In "Popular Government," whatever view may be taken of its tendency, it will at all events be admitted that its author shewed a grasp of modern politics, and an insight into the latter-day working of the constitutional machine, which rendered it almost a matter of course that, on the recent vacancy in the University representation caused by the death of Mr. Beresford Hope, academical opinion should, in this instance also, have pointed with practical unanimity to Sir Henry Maine as his most appropriate successor; but he doubtless felt that there were other spheres in which his fine intellectual powers could do higher service than amid the strife of tongues and in the turbid atmosphere of the present House of Commons.

Of personal recollections of Sir Henry Maine I can add but little. With his presence I first became familiar when he delivered the annual Rede Lecture at Cambridge in the May term of 1875. His subject was "The effects of observation of India on modern European thought;" the lecture has been reprinted, together with the Calcutta Addresses and the Essay on Roman Law, in the same

⁽¹⁾ See *Cape Law Journal*, Vol. I, p. 210; Vol. II., p. 28; Vol. III., p. 292; Vol. IV., p. 48.

volume with "Village Communities;" and seldom if ever has the Rede Foundation produced an equally valuable discourse on an equally suggestive theme. Striking too was the personality of the lecturer, on whose words a large and representative audience hung with an interest which never flagged. His features could scarcely be called handsome, but they bore the impress of his robust and vigorous intellect; and the interest of his subject, and of his treatment, lost nothing from an elocution which was both virile and refined. Some years later, as already mentioned, I had some discussion with him as to the meaning of a well-known passage in the Trial Scene in Homer's description of the Shield of Achilles. On this passage I had read a paper before the Cambridge Philological Society, in which, fortifying myself with an opinion expressed to me by the late Mr. Shilleto, I ventured to suggest an interpretation differing from that upon which an argument in "Ancient Law" is based. To quote any portion of the correspondence on the subject which ensued might savour of egotism. Let it suffice to say that in what he wrote Sir Henry Maine displayed, not merely an urbanity which among the scholars of the present day is fortunately not exceptional, but a friendly interest and sympathy with which a veteran does not always respond to the daring challenge of a neophyte. It happened that Mr. Gladstone, in his "Homeric Studies," had taken the same view of the ambiguous expression as Sir Henry Maine. I ventured to send him a copy of my paper, which, with characteristic courtesy, he acknowledged in the following terms:—"I have read with much interest the paper you have kindly sent me. As far as I can speak after so many years, I followed authorities whom you cite in my interpretation of II. xviii. 508. The strength of the argument appears rather to lie on the side of your view." Meanwhile, Sir H. Maine had referred the matter to a well-known Cambridge scholar, and after a time sent me his opinion, which was to the effect that he believed the interpretation in "Ancient Law" to be correct, but thought it impossible to prove my contention to be wrong. On my quoting what Mr. Gladstone had written, Sir H. Maine suggested that the matter should be submitted to him again, with the further arguments which had been marshalled on either side. I did not, however, venture to make a further encroachment on his time; *adhuc sub iudice lis est.*

My last communication with Sir H. Maine was shortly before coming out to the Cape, the state of my health having rendered that course expedient, when he wrote a kindly letter, auguring from what he had known in other cases good results from a trial of the Cape climate, and giving me a line of introduction to an old school-fellow of his, one of the few classical scholars who have made the Cape their home. These recollections are but slight, and even their bare mention perhaps requires apology; but Sir Henry Maine was one of those men with whom even a slight measure of personal intercourse could not fail to enhance the respect and admiration which his career and works inspired. Sufficient has been written to shew how brilliant, from first to last, was that career; but it is not merely or chiefly for its brilliancy that it will be most remembered. His was an intellect which may be best described as luminous, and a character which may best be described as massive. Such qualities, so highly developed, and such gifts, so worthily employed, are happily not wholly lost to us. The poor vital spark expires, but the work of genius does not pass away. The life and labours of Sir Henry Maine might well have been inspired by the words of Pliny, *quatenus nobis denegatur diu vivere, relinquamus aliquid quo nos vixisse testemur*. The yearning which they express has in his case assuredly been fulfilled.

P. M. L.

BARRISTERS AND SOLICITORS ABROAD.*

In view of the Solicitor-General's recent advocacy of the suggested union of the two legal professions (which advocacy, coming from so high a personage in the legal world, has so restored the dry bones of an old controversy, as to bring it well before the public once more), it is thought that it may be useful to give a short *résumé* of the state of the legal profession, or professions, in those foreign countries where any but the most primitive form of legal system obtains. There appears to be so much ignorance abroad as to the precise status of lawyers in most such countries, and such

*For this article we are indebted to a correspondent of the *Morning Post*. Being a question of great importance to the whole profession, it is well worthy of reproduction here.—*Ed.*

rash statements are constantly made as to the merits of particular systems erroneously alleged to obtain in particular countries, that information of this kind ought to be found useful; for, obviously, in deciding the question of "amalgamation" we ought to be guided largely by the experiences of other countries.

In the following analysis (from which all mention of Great Britain has been purposely excluded) the first thing that strikes one is the fact that of the twenty-eight countries of which we have particulars (taking the word "countries" to include States and Colonies) in only four are the two professions quite distinct. In all the others there is practically only one kind of lawyer; for in two, Canada and New Zealand, where there is a double roll, almost every lawyer's name appears upon each. The minority of four are France, Victoria, New South Wales, and the Cape of Good Hope. Against these four are ranged West and South Australia, Queensland, Canada, the United States, and Europe generally in all which places the lawyer does, or at any rate may do, all the work which is done in this country by the combination of barrister and solicitor. It is proposed to glance briefly at the main conditions of the legal community in each of these countries.

To commence with the United States, which are the constant example held up to us by supporters of amalgamation. In New York the profession has never been divided, and it is therefore not easy to certainly ascertain whether the public there is generally content with the existing state of things or not. But we may assume, knowing what we do of American character, that the prevailing system works satisfactorily, inasmuch as there is no agitation for change. There every lawyer is both counsel and attorney, and often other things beside. He institutes proceedings in his own name, and he appears in Court when he pleases. Partnerships, however, are very general, and in most cases one partner devotes himself to office work and another to Court work, though sometimes each of them keeps his cases in his own hands all through. There is a considerable number of lawyers who devote themselves exclusively to the work of advocacy; and these, by reason of their special eminence, &c., stand to other lawyers in much the same position as an English leader does to solicitors. As for the costs of litigation in New York (and generally in the

other States) they vary greatly, being generally dependent upon the view taken of each case by the presiding judge.

Of South Carolina, Maryland and Louisiana, much the same may be said. In all these States partnerships are common, but not universal; the client has direct personal relations with his advocate; and no one appears to be desirous of any change in the existing system. Sometimes there is an authorised schedule of fees, sometimes not; but, on the whole, it seems pretty certain that litigation in these States is comparatively cheap. The same state of things prevails in Alabama, Massachusetts, Pennsylvania, and Texas; but it may be added that in each of these States it is said that the public is strongly opposed to any idea of change. In Colorado the feeling against separation seems to be even stronger. In California it appears to be the usual practice for a lawyer to carry his case right through from beginning to end; though it is a fact that in cases of special importance an outside advocate is sometimes employed as "leader" in Court. Court costs are small, and, as a rule, follow the event; while the lawyer's fee may be a matter of arrangement.

The Canadian system has a good deal to recommend it. Here, though the professions are practically united, each has its own roll and its own qualifying examinations. Every lawyer has to pass the same preliminary and two intermediate examinations; but the finals are quite distinct, and each will qualify candidates for one branch of the profession only. Nevertheless, 99 out of every 100 lawyers are upon both rolls, and competent to do both kinds of work. This system is said to work extremely well, and neither practitioners nor the public express any desire for change. In practice, only young lawyers carry on the dual business. Partnerships abound, and partners are divided into office men and Court men. The Courts being arranged on practically the same lines as in England, Canadian experience should be specially valuable in this connection, and it is therefore satisfactory to note that the Canadian system is said to work much more cheaply for litigants *pro ratâ* than does our own.

In the Colonies the general feeling is distinctly in favour of fusion. In Australia the professions are now distinct only in Victoria and New South Wales. In the first named the public

is discontented, while the profession is said to be divided on the question of fusion, for which a Bill recently passed through the Lower House only to be rejected by the Upper House. At present legal fees are higher than in England. In New South Wales it is said that amalgamation is only a question of time. In Queensland fusion was effected in 1881, and there is no apparent desire to revert to the old system; while in South Australia all parties are said to be strongly opposed to any suggestion for a division of the united profession. And the same may be said of Western Australia, where a lawyer is admitted to practice as barrister, solicitor, attorney, and proctor by a Statutory Board appointed to preside over the profession.

New Zealand is like Canada, in so far as it possesses two rolls, but here, again, the great majority of lawyers are on both. Here too, partnerships are the rule, and each eminent advocate is at the head of a firm.

Except France, the Cape of Good Hope is the only remaining country where the profession is divided. But, seeing that in the neighbouring colonies of Natal, the Orange Free State, and the Transvaal only one legal profession is recognised, it may be concluded that it is owing to the apathy of the public that amalgamation has not yet been effected here; for the lawyers themselves are opposed to changes in their own interests.

Of European countries France stands alone as supporting three distinct branches of the legal profession. Here the barrister is the *avocat*, while the *avoué* represents an English solicitor, but with limited functions. He collects evidence, prepares cases, and attends before officials; but he never pleads personally. Most of the other important duties of an English solicitor are performed by the *notaire*, who manages property, and draws up wills and deeds. Each of these three professions is perfectly distinct; and lawyers appear to desire no change. This is probably due to the simple fact that *avocats* and *avoués* are restricted to a certain number. Amongst the Radical public a desire has been manifested for amalgamation.

In every other European country fusion obtains, and in only two of them does there seem to exist any desire for change. These two are Bavaria and Wurtemberg, and the discontent in

either place may safely be referred to the restrictions which are imposed upon a lawyer's right of general practice. In Wurtemberg, though a lawyer may practice in any criminal Court, he can only practice civilly in the Court of his domicile. In Bavaria he must attach himself exclusively to a single Court or set of Courts. Thus a lawyer who appears in a Court of first instance cannot appear in the higher Court if his case is appealed—a condition which is enough in itself to cause dissatisfaction. In Holland and Italy the professions have not long been amalgamated, but in both places the present system appears to work satisfactorily, and with greater economy than under the old conditions. It may be worth noting that in Spain the partnership system, which is often asserted to be the inevitable result of an amalgamation, is unknown; and it is rare in Germany and in Norway. In Germany, moreover, where it does exist, each partner conducts both office and Court work.

It would thus appear that all the evidence obtainable from comparison between Great Britain and other countries is in favour of Sir Edward Clarke's proposed reforms; but it must be borne in mind that such evidence is at best delusive. No other country can fairly be compared with England in this matter. English law is so complicated, and in its bulk so vast, as to require an amount of special knowledge on the part of advocates which is needed nowhere else. To judge from what we know of Canada, it would seem that if amalgamation were brought about in England it would, after all, be a theoretical rather than a practical reform, each lawyer continuing to devote himself more or less exclusively to what is now a solicitor's or a barrister's business, though young lawyers would, of course, be found ready to undertake any kind of work.

The subjoined table shows the state of the legal profession in each of the countries named, and, as far as it can be ascertained, the feeling of the public and of the profession in this matter:—

Name of Country.	State of Legal Profession.	Feeling of Public towards existing state.	Feeling of Profession.
<i>a</i> New York, U.S.A..	United	Presumably satisfied ..	Satisfied.
<i>a</i> California	"	Quite satisfied	Quite satisfied.
<i>a</i> Colorado	"	Strongly opposed to any change	Strongly opposed to any change.
<i>a</i> South Carolina ..	"	Apparently satisfied ..	Satisfied.
<i>a</i> Louisiana	"	Apparently satisfied ..	Satisfied.
<i>a</i> Maryland	"	Indifferent	Satisfied.
<i>a</i> Massachusetts ..	"	Strongly opposed to change	Strongly opposed to change.
<i>a</i> Pennsylvania	"	Strongly opposed to change	Strongly opposed to change.
<i>a</i> Texas	"	Strongly opposed to change	Strongly opposed to change.
<i>a</i> Alabama	"	Strongly opposed to change	Strongly opposed to change.
<i>a</i> West Australia ..	"	Uncertain	Uncertain.
<i>a</i> South Australia ..	"	Uncertain	Opposed to change.
<i>b</i> Queensland	"	Uncertain at present ..	Uncertain at present.
Victoria	Separate	In favour of fusion ..	Divided.
New South Wales ..	"	Said to be in favour of fusion	Divided.
<i>c</i> Bavaria	United	Content	Anxious for removal of restrictions.
<i>d</i> Canada	"	Quite satisfied	Quite satisfied.
<i>e</i> Cape of Good Hope..	Separate	Indifferent	Solicitors indifferent. Bar opposed to change
<i>f</i> France	"	Divided: majority in-different	Generally satisfied.
<i>g</i> Denmark	United	Satisfied	Apparently satisfied.
<i>h</i> Germany	"	Satisfied	Satisfied.
<i>i</i> Holland	"	Doubtful	Doubtful.
<i>j</i> Italy	"	Apparently satisfied ..	Apparently satisfied.
<i>h</i> Norway	"	Satisfied	Satisfied.
<i>k</i> Portugal	"	Satisfied	Satisfied.
<i>l</i> Spain	"	Quite satisfied	Satisfied.
<i>m</i> Wurtemberg	"	Desirous of change ..	Desirous of change.
<i>n</i> New Zealand	"	Apparently satisfied ..	Satisfied.

REMARKS.

a Litigation is generally supposed to be cheaper than in England.

b Fusion only effected in 1881.

c Each lawyer attached to a Court or set of Courts.

d Double qualification almost universal.

e In Natal, the Transvaal, and Orange Free State, fusion obtains.

f Triple division of professions.

g Each lawyer attached to a Court.

h Partnerships rare.

i Only amalgamated in 1879.

j Only amalgamated in 1874.

k Only one branch, solicitors are unknown.

l Partnerships quite unknown.

m In civil cases lawyers can only practise in Court of domicile.

n Double qualification almost universal.

Sweden has no legal system whatever; anyone may appear for himself or for anyone else.

REVIEW.

VAN LEEUWEN'S COMMENTARIES ON ROMAN-DUTCH LAW.*

To the student of Roman-Dutch jurisprudence, the translation of "*Simon van Leeuwen's Commentaries on Roman-Dutch Law*," by Chief Justice KOTZE of the Transvaal, will be a valuable companion. To the Colonial practitioner it will now, no doubt, become a work of more frequent reference, especially when the practitioner happens to be one of the many who find the study of the law in force in this Colony somewhat difficult, owing to the fact that they do not possess such an acquaintance with Dutch and Latin as to render the study of the law easy in the languages in which the commentators have clothed their thoughts. The two volumes before us contain much good, solid information, not only in the text itself, but in the notes which have been appended by the translator, in many instances giving references to text writers of eminence, and to cases decided both in the English and the South African Courts.

As far as we have been able to judge, the translation appears to have been carefully and conscientiously made. Of Van Leeuwen himself, and the reputation he won among not only his contemporaries, but among the text writers who followed him in the Netherlands, we need say but little. He was undoubtedly an eminent lawyer, and a most assiduous writer, and the popularity and high estimation in which his commentaries were held is shewn by the fact that between 1678 (the year in which they first appeared) and 1780 (when the revised edition of Cornelis William Decker was published), the work passed through no less than eleven editions. Van Leeuwen was born in 1625, and was but three-and-twenty when, after eighty years of unparalleled warfare (only interrupted by the truce of 1609), the Treaty of Munster was signed, 30th July, 1648. By this treaty the sovereignty of the States-General received ample and entire recognition, and all

* *Van Leeuwen's Commentaries on Roman-Dutch Law*, Translated from the original by J. G. KOTZE, LL.B., Chief Justice of the Transvaal. In two volumes. London: Stevens & Haynes.

claims on the part of Spain were renounced, and the rights of trade and navigation in the East and West Indies were confirmed. The New Republic then rose from all the horrors of civil war and foreign tyranny to its "uncontested rank as a free and independent State among the most powerful of the nations of Europe." He was a contemporary witness of the struggle for civil and religious liberty in England—the English Revolution, "the greatest event," according to Guizot, "which Europe had to narrate previous to the French Revolution." He was a contemporary witness also of the severe contest between the "United Provinces" and the rival Commonwealth; of their struggle for naval supremacy, and of the bloody conflicts between the Dutch Admirals, De Ruyter, Tromp, and De Witt, and the English commanders, Blake, Dean, Monk, Pen, and Lawson. He might boast of being the citizen of a State of which he might justly feel proud. It would not have surprised us to find this natural pride appearing in his writings; but it is somewhat surprising how rarely the stirring history of the times has excited the clear-headed lawyer. He writes of the Government and Constitution of his country with a stolidity that would almost lead one to suppose that they had never been in jeopardy for generations. His life seems to have been spent in comparative quiet. He won none of the great prizes of the profession to which he belonged, though he held the responsible and honourable post of Assistant Registrar of the Supreme Court of Holland, Zealand, and West Friesland. Few details of his life are known, and those of no great interest. He died in 1682. His assiduity as a writer is evidenced in his annotated edition of the "*Corpus Juris*," and his "*Censura Forensis*," both of which are deemed of value and high authority. Besides the works already mentioned, he published handbooks on Civil and Criminal Procedure and Notarial Practice, and treatises on "*Costuymen of Rhineland*," and the "*Origin of the Nobles and well-born men of Holland*." The last-mentioned are not often seen at the present day, and have been supplanted by writers of later date.

It is obvious that the "*Commentaries*," as representing the state of the Dutch law shortly after Jan van Riebeeck commenced the Dutch settlement of the Cape in 1652, must be of the greatest value to the student of the law in force in South Africa. Though

Grotius must always remain a necessary work of reference and authority to every practitioner, there is much in Van Leeuwen's Commentaries which does not appear in the works of his predecessor. In the volumes now before us we also have the criticisms of C. W. Decker, which bring the law down towards the end of last century. Some of the matters discussed by Van Leeuwen seem to be of no interest at the present day. If the pages were deleted which refer to questions which do not and cannot now arise, the publication would have been considerably reduced in size; but they present an exceedingly interesting picture of the life and the times in which they were written.

In parts, too, it may be said that Van Leeuwen and Decker are somewhat garrulous. We need only refer to the long description in the text of the legal proceedings taken by Gerard Bikker to escape from his promise to marry Miss Alida Koninks. Eventually the lady was to all intents and purposes successful (as the fair generally are) in her suit, as the defendant Sheriff of Muyden married her. In these days, when divorces are too common, the absurdity of a compulsory marriage is obvious. The Marriage Order in Council has taken away one of the remedies formerly possessed by the victims of changed affections, and in our Courts we no longer witness attempts to obtain "specific performance" of a promise to marry. Blighted affections have only their price in damages assessed in the current coin of the realm.

Again, Van Leeuwen (p. 287, Vol. II.) cannot resist the temptation of inserting an account of expenses incurred in the combat of a certain "Willem Van Leeuwen, living at Alphen, and Boudyn Jansz, of Delft." The pairs of gloves which these gentlemen required in preparing for the combat would nowadays be deemed ample for a bride's trousseau.

It is amusing to find Decker (Vol. II., p. 222) solemnly protesting against an attack upon the veracity of brokers. Some unfortunates had written "*Proxenite abundant mendacius et in ambiguo præsumentur mendaces.*" Decker's view as to the confidence to be placed in brokers' notes by courts of law has of late been frequently proved in our Courts to be correct, as many a speculator in shares has found to his cost.

Valuable and suggestive notes have been added to the text by Chief Justice KORZE, and many useful references to decisions of the Supreme Court, not however always with approval. In fact, the translator has shewn, that he can not only entertain an opinion of his own, but support it when necessary with forcible argument. The discussion as to the necessity for a valuable consideration to support a contract is renewed in an attack upon the reasons given for the decision in *Alexander v. Perry* (Buchanan, 1874, p. 61), and we cannot help thinking that the Chief Justice of the Transvaal has considerable force in his argument. Most civilians would admit that *Alexander v. Perry* was rightly decided, for the simple reason that both by the civil and English law of services, contracts of letting and hiring require a *quid pro quo* for the services given to render it valid; and therefore by both laws there was the necessity for a *valuable consideration* in the English sense of the expression; but for the decision of that case it certainly was not necessary to decide the vexed question whether a valuable consideration was or was not necessary to support all contracts in this Colony. However, this question has been already discussed in this journal, and we need now only express the hope that for the sake at least of preserving uniformity of decision in our superior Courts in South Africa, the exact difference between *causa* and consideration will not be forgotten when the matter again arises. Those who are interested in the discussion will find the question treated at length in *Malan and Van der Merwe v. Secretan, Boon & Co.* (Foord's Reports, p. 94). The legislature, as Chief Justice KORZE remarks, is undoubtedly the proper authority to change the law, and not those who are merely entrusted with the administration of the "law as they find it." The translator has, in another note, dealt somewhat roughly with the decision of the Appeal Court in *Queen v. Fortuin* (1 App. Cas., 290), which decided that *furtum usus* was not an indictable offence in this Colony; and he seems, in spite of the authorities cited in the Appeal Court, to entertain the view that the Judges were altogether wrong in the broad proposition they enunciated; and that, in pronouncing their judgments they were in fact abrogating the common law of the Colony. The law student who has learned the oft-repeated definition of theft of Paulus (Dig. 47, 2, 3), "*Furtum est contrac-*

tatio rei fraudulosa lueri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve," may be permitted to entertain doubts as to the correctness of the decision if it were based upon the civil law only.

There can be little doubt that the Roman jurists would, under the definition, cited, have held that there could be a theft of the use. But the point which the Appeal Court really had to decide was whether in Roman-Dutch law this strict definition of the civil law had been adopted, and whether in Holland the theft of the use was considered a punishable offence. The translator in his note says, "On appeal, DE VILLIERS, C.J., and SMITH, J., thought that, as Voet and Groenewegen *seem to leave this question in doubt*, and the practice in the Colony had not been to indict in such a case, the opinion of the Court should be in favour of the prisoner. BARRY, J.P., while admitting that by Roman-Dutch law there could be a theft of the use, held that it was not an indictable offence in the Colony." This is hardly a fair representation of the views entertained by the Judges named, as a reference to their judgments will clearly shew. The Chief Justice does *not* express the opinion that the question is left in doubt by Voet and Groenewegen. "When we turn," said DE VILLIERS, C.J. (p. 294), "to the Dutch commentators we find that the *furtum usus vel possessionis* is treated as an act which is not criminally punishable under the Dutch law. Thus Groenewegen, in his Commentary upon the Institutes (4, 1, 7), says, '*Si creditor pignore depositarius re deposita utantur aut commodatarii rebus commodatis aliter utantur, quam utendas acceperunt, furtum committunt juri civili. At sicut vitæ, ita et famæ hominis parcendum est; ideoque nostris et aliorum moribus non furti actione quæ soli fiseo competit, sed tantum modo civiliter tenentur ad id quod interest.*' Voet (42, 2, 15)," says the Chief Justice, "goes fully into the matter, and agrees with Groenewegen that in the Roman-Dutch law the *furtum usus* in the case of bailees is no longer punishable as a criminal offence; and adds the words '*ac si quis his similis sit.*'" The judgment of Mr. Justice SMITH, far from being based upon a doubt left by Groenewegen and Voet, is founded upon distinct authorities, which he cites. Mr. Justice SMITH, when still a Judge of the Eastern Districts' Court, had considered and decided the point in *Queen v. Dier* (3 Buch. E.D.C. Reports, Appendix). And there can be no

doubt that there is much in the authorities cited, to which the curious can easily refer, to be advanced in favour of the view he then took.

But the translator in his note says, "It is true the learned Chief Justice based his judgment in *Queen v. Fortuin* partly upon a written opinion of Porter, *A.G.*, that it was not the practice in the Colony to indict in such cases. But the practice of the Attorney-General, however eminent in his profession, not to indict for *furtum usus* cannot alter the substantive law of the land." This is a self-evident proposition, which nobody seems to have denied. But what was it that the Chief Justice actually said? "I have referred to his opinion *not* for the purpose of shewing what the law is, but in order to prove what the actual practice has hitherto been." One thing, however, is clear to the Colonial practitioner, namely, whatever may be the view of the Chief Justice of the Transvaal, no Court in this Colony will now follow the severe view which he advocates, but will be guided by the more lenient opinion of Mr. William Porter, affirmed as it is by the unanimous judgment of the Appeal Court.

Upon what grounds the Chief Justice of the Transvaal arrives at the conclusion (Vol. II., p. 305) that "In South Africa adultery is no longer considered a crime," he does not state; but presumably it must be upon the very ground which he thinks so objectionable upon the part of the Chief Justice of this Colony, namely, that the Attorney-Generals of this Colony, and possibly of the neighbouring States, have not indicted. He has, however, forgotten that cases have occurred in the Supreme Court where a married man, as a witness, has claimed the privilege of refusing to reply to the question whether he has or has not been guilty of adultery, upon the ground that his answer might tend to criminate him, and his objection has been allowed. Moreover in *Queen v. Korck* (Buch. 1875, p. 6) the very gist of the question raised was based upon the ground that adultery was a crime.

Occasionally the views of the translator are not precisely those which are entertained by our practitioners as to the effect of our Colonial Statutes. For instance, in Vol. I., p. 107, to the statement in the text that "the consent of guardians to the marriage of their pupils is not necessary," there is the following note:

[“*Cf. Van der Linden, Bk. I., ch. 3, § 6*]. *At the Cape of Good Hope the consent of guardians to the minor's marriage is necessary. Vide Marriage Order in Council, 1839, §§ 10 and 17.*” We are not aware that this construction has ever been placed judicially upon the Order referred to, and many practitioners entertain strong doubts upon the point, and advise accordingly, recommending an application to the Chief Justice, even when there are guardians living in the Colony, for leave to marry. The common law, they say, did not require the consent of guardians before the Order in Council was promulgated, and there is nothing in the Order which distinctly renders their consent necessary or sufficient if it was not previously required by law. The Order was intended to apply not only to this Colony, but to certain other “British colonies, plantations, and possessions,” in some of which the consent of guardians was necessary and in others it was not; and consequently that the expressions used in the 10th and 17th sections do not change the law here. However, they advise an application to be made to the Chief Justice for leave to marry when the parents of minors are dead, incapable of consenting, or absent from the Colony. Until this matter has been judicially decided in accordance with the view expressed by Chief Justice KORZE, it would certainly be safer to follow the course they have heretofore pursued, *ex abundante cautela*.

There is one criticism of the translator's which would strike many a lawyer as somewhat unnecessary, if not captious. He calls Mr. A. F. S. Maasdorp to account for translating “erflating” into English as “institution of heir,” whereas Chief Justice KORZE himself translates it as “reliction of inheritance” (see Vol. I., pp. 343, 361). Now, it would puzzle many a lawyer to tell precisely wherein the legal distinction, even if there be a difference of any legal importance, lies. Even Grotius and Van Leeuwen do not seem to see it. *Quandoque bonus dormitat Homerus* may of course in this case be true. Grotius, for instance, writes: “Erflating is een betekening des willes, wit men wil, dat erfgenaam zal zyn” (Grotius 2, 14, 6).

At the end of the second volume there appears an interesting note on the late decisions of the Supreme Court of this Colony (*Oak v. Lumsden*, 3 Juta, 144), the Eastern Districts' Court

(*Whitnall v. Goldschmidt*, 3 E.D.C., 314), and the Supreme Court of Natal (*McAlister v. Rauch*, 6 Natal Law Reports, N.S., 10), on the *beneficium Senatus Consulti-Vellejani*, which should be read by lawyers at least, and possibly by our legislators, as it may point to the desirability of dealing legislatively with the legal questions involved.

In reading the long list of cruel punishments stated in Van Leeuwen's text, which are held *in terrorem* over the guilty, the thought is naturally suggested that by the law of this Colony the possible punishments are as severe as those which were imposed in England when Blackstone penned his praises of the criminal law of England and brought down the thunders of Bentham and Sir Samuel Romilly upon his devoted head. As a fact, the punishments now imposed are mildness itself compared with those which the law permits. We cannot imagine the sentence of death being passed upon a thief for stealing apples by night in an orchard, and we should be astonished at any of our Judges being guilty of such severity. We should look with horror upon the Judge who sentenced an incendiary to be "strangled, his face scorched with flaming fire, and his body to be placed upon a wheel" (see Vol. II., p. 320). Death in Dutch as in English law was a common penalty; for rape it undoubtedly still remains in our own law. Whether the Judges of this Colony will impose this penalty remains to be proved. If it were imposed, it is highly questionable whether the morbid sympathy created by the severity of the punishment for the doomed man, might not weaken the results expected from the penalty, and add another wrong to the injury already sustained by the woman.

Why, then, should these punishments remain possible in our law? Our legislators have now an opportunity of making themselves acquainted, in the vulgar tongue, with the severity of our laws as they stand, and some merciful legislator may possibly be induced at least to remove the stigma of some of these unnecessary penalties from our legal system.

In conclusion, we have no hesitation in saying that the Chief Justice of the Transvaal deserves the thanks of the English-speaking inhabitants of South Africa for having placed before them a translation of a most useful work upon Roman-Dutch jurisprudence.

RECEIVED FOR REVIEW.—*The Elements of Jurisprudence*, by Thomas Erskine Holland, D.C.L., Chichele Professor of International Law and Diplomacy, and Fellow of All Souls' College, Oxford. Fourth Edition. Oxford: The Clarendon Press.

DIGEST OF CASES.

SUPREME COURT.

King v. Pedersen. (Feb. 1).—The 17th section of the Insolvent Law Amendment Act, No. 38, 1884, is, like the 8th section, retrospective, and applies to estates sequestrated before the passing of the Act. Consequently, after the lapse of four years from the date of surrender, no execution can issue against any unrehabilitated insolvent under the 127th section of the Insolvent Ordinance.

Harvey v. Beaconsfield Municipality. (Feb. 6).—A bye-law authorising the charge of a fixed rate, to be paid to the corporation in advance, for the removal of rubbish, stable litter, &c., from any house, shop, or office, "inhabited or intended to be inhabited," is not *ultra vires* [in] the municipality of Beaconsfield, in so far as it related to premises occupied. *Quære*, whether such a bye-law would not be bad, as unreasonable, as far as unoccupied premises were concerned.

Bank of Africa v. O'Connor. (Feb. 7-16).—A produce dealer forwarded certain wool to woolwashers at Uitenhage. These woolwashers gave undertakings to hold the wool on account and at the disposal of the Bank, and upon these undertakings the Bank made advances to the dealer. Afterwards, upon instructions of the dealer, the woolwashers sent the wool to defendant, a woolpresser and shipper at Port Elizabeth, advising the Bank of having done so. The defendant, before any communication had been made to him of the Bank's lien, delivered the wool to persons who had bought the same from the dealer. *Held* (affirming the judgment of the Port Elizabeth Circuit Court), that the Bank had not established a right of action upon contract against the defendant.

Colonial Government v. Jones. (Feb. 8).—A market-master selling colonial produce at a duly-established municipal market is not liable to Government for auction duty.

Nortje v. Nortje. (Feb. 8-16).—During the subsistence of a marriage in community, a legacy vested in the wife, subject to the life interest of her surviving parent. Before the death of such survivor the marriage was dissolved, at the suit of the wife for her husband's adultery, and the joint estate ordered to be divided. On the death of the surviving parent after the divorce, the legacy was ordered to be divided as part of the joint estate affected by the judgment given at the time of the decree of divorce.

Loubser's Trustees v. Loubser. (Feb. 16).—The 17th section of the Insolvent Law Amendment Act, No. 38, 1884, must be read as a proviso to the 127th section of the Insolvent Ordinance. Consequently, after the lapse of four years, no execution can issue under the 127th section, even though the insolvent does not come forward and claim the benefit of the 17th section of Act 38, 1884.

Re Marnitz. (Feb. 16).—The election of a trustee in an insolvent estate was objected to on the ground that certain creditors, who had proved claims and voted for the trustee, had no right to prove. The Court refused to set aside the election

as long as the claims stood admitted, but postponed confirming the election so as to give time for proceedings to expunge the proof of debt.

Miller v. Miller's Executors. (Feb. 16-24).—The testator bequeathed specially his residence and furniture to plaintiff. During life the premises caught fire, and during the fire the testator died. The house and furniture were totally destroyed. The property was insured, and the insurance company paid the money to the executors. A special case was brought to determine whether the executors should pay the money to the legatee or whether it fell into the residuary estate. A compromise was effected, giving half the insurance money to the legatee and half to the residuary heirs, who were minors. The Court confirmed the compromise.

S. Leger v. Rowles. (Feb. 17).—In a newspaper controversy the defendant accused the plaintiff, as editor of his newspaper, of cooking and altering the reports of parliamentary proceedings to suit his own political aims. The plaintiff proved that the reports were impartial, and that he had not in any way interfered with them. *Held*, that this was imputing to plaintiff dishonest and dishonourable conduct, and was actionable.

Kington v. Smuts. (Feb. 20).—The plaintiff dealt with defendant, knowing he was a minor, selling him a business and supplying him with goods, taking cession of an inheritance due to defendant on his coming of age. The plaintiff now sued to recover the inheritance ceded, alleging that the minor was at the time of the transaction emancipated. The Court held that there had been no express emancipation, and that tacit emancipation had not been proved, and gave judgment of absolution from the instance, so that plaintiff might, if so advised, prosecute a claim for necessities. The defendant having, notwithstanding the cession of his inheritance, drawn the money on the day he came of age, the plaintiff, without obtaining a warrant, gave defendant in charge for fraud. The prosecution was dropped, the Magistrate refusing to commit defendant for trial, leaving plaintiff to his civil remedy, if any. The defendant claimed in reconvention damages for illegal arrest and imprisonment. The Court awarded nominal damages, as the plaintiff by arresting without warrant must be held to take the risk of the act.

Standard Bank v. Wilman, Spilhaus & Co. (Feb. 21).—One F carried on business in London and in this Colony. F in London shipped certain goods to the local house, obtaining a bill of lading stating freight "being first paid in London in cash without discount." The shippers afterwards took F's acceptance at two months for the freight. Before the acceptance matured or the vessel arrived, F's estate in the Colony was sequestered. Meanwhile, the plaintiff Bank had received the bill of lading endorsed to them for value. *Held*, that the plaintiffs were entitled to receive the goods on arrival, notwithstanding that the freight had not been actually paid.

Re Estate Mayberry. (Feb. 23).—An attorney's bill of costs against his client for services rendered in non-contentious matters is not liable to taxation before capable of being proved on the insolvent estate of the client.

Queen v. Jantjes. (Feb. 27-29).—Where the Government, through the Colonial Secretary's department, authorized the employment of convicts on a farm for the purpose of building a dam for the farmer, and the farmer was sworn in a special constable and acted as gaoler, *Held*, that the farm was a gaol, and the farmer a gaoler, within the meaning of the Gaols Ordinance, but that as a gaoler was forbidden by the Ordinance from performing any other functions than those of gaoler, or from being interested directly or indirectly in the supplies of the prison, any order given by the farmer as such gaoler to any convict to perform any work for the private benefit of the farmer, was not a "lawful order" under the 10th section of the Gaols Ordinance, for which the convict could be punished as therein provided for disobeying.

Hilpert v. Castle Packet Co. (Feb. 29).—Plaintiff sued in *forma pauperis* in the Eastern Districts' Court for damages for injury sustained while in defendants' service. Judgment was given for defendants. The plaintiff gave notice of appeal, but did not prosecute his appeal within the three months fixed by law, alleging he had not been able to raise funds for the appeal. On application to the Supreme Court for an extension of time, the Court granted leave to prosecute the appeal at the next sitting of the Court, but as it was an indulgence and not a matter of right, requested the plaintiff within that time to give security for the costs of appeal.

NORR.—The digest of cases of the Eastern Districts' Court and High Court of Griqualand will appear in our next number.

THE AUTHORITY OF COUNSEL.

The authority of Counsel to deal at their discretion with cases entrusted to them formed the subject of discussion in the Court of Appeal in England last November. The case *sub judice* was *Matthews and Wife v. Munster*. The action had been brought for malicious prosecution. Having lasted throughout one day, on the morning of the second day Counsel on both sides agreed to a settlement, the terms being in favour of the plaintiff for £350 and costs. An hour after the case had thus terminated, the defendant arrived in Court, and upon hearing what had been done at once repudiated the compromise. The Divisional Court refused to set aside the compromise, and accordingly the defendant appealed. According to the *Law Times Reports* (Vol. 57, N.S., 923), Counsel for the appellant, defendant below, submitted (*a.*) that Counsel had no implied authority to settle an action, only to fight it, and (*b.*) that in order to settle he must have express authority from his client (*Swinfen v. Swinfen*, 1 C.B.N.S., 364; *Prestwich v. Poley*, 18 C.B.N.S., 806; *Swinfen v. Lord Chelmsford*, 5 H. & N., 890). The case last named was adopted by the Court of Appeal as the leading case on the point in issue, and the opinion of Lord Chief Baron POLLOCK was quoted by both the Master of the Rolls and Lord Justice BOWEN. The Court of Appeal, without calling on Counsel for the respondents, plaintiffs below, delivered judgment dismissing the appeal. Lord ESHER observed that the relation between Counsel and his client was sometimes put as being that of principal and agent, but his lordship refused to adopt that

phraseology, and considered that a distinct relationship existed, the relationship of advocate and client. "The profession of an advocate," Lord ESHER said, "is to merely advise his client with reference to a case before it comes into Court, but as soon as it comes into Court, to act for him altogether in the conduct of it. In Court the advocate is acting as the superior in the matter, and has unlimited power as to the conduct of the case." But, Lord ESHER went on to point out, the power of Counsel as part of the conduct of the cause, was under the supervision of the Court who would not allow injustice to be done, and that in case of a client being injured by the giving of undue advantage to the other side, or in case of a "slip" resulting in injury to the client, the Court could set aside the proceedings and order a new trial. But as against his client, the advocate's authority is unlimited in the conduct of a cause in Court. The advocate's authority, however, is limited to the doing of that which is fairly necessary to the conduct of the cause. Lord Chief Baron POLLOCK, in *Swinfen v. Lord Chelmsford*, gave instances of what was incidental to the conduct of the suit, "such as withdrawing the record, withdrawing a juror, calling no witnesses, or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belong to the suit and the management and conduct of the trial."

The limitation to Counsel's authority is found in matters that are collateral to the suit. Then Lord ESHER adds that the assenting to a verdict for a particular amount and upon particular terms (in the present case a withdrawal of all imputations) is one of the things which properly belong to the management and conduct of the trial, because Counsel may see that otherwise a verdict for a very large amount might be given. Of course if the client be present he is at liberty to object, and to have his brief returned by Counsel, and conduct his own case. Lord ESHER repeated that although Counsel's authority is unlimited, the Court retains control over his proceedings, and in the present case there was no symptom of any injustice having been done, while, no doubt, the Counsel did what was really best for his client.

Lords Justices BOWEN and FRY concurred in the judgment of the Master of the Rolls. Lord Justice BOWEN held that the duty of Counsel and his authority are commensurate, that Counsel's

authority could not include the acting unreasonably, while Lord Justice Fry, in reference to the compromise the subject of appeal, considered that the Court would come "to a most disastrous conclusion, not as regards the interests of the Bar, but for the interests of the public," if the compromise were set aside, since there was nothing in it that was outside the case, nothing which was unjust, or which shocked the conscience of the Court, and nothing in the nature of a slip. His lordship deemed the power of Counsel to agree to a compromise to be a most valuable power which the Court should do nothing to lessen.

It is noteworthy in this case that the only argument advanced for the appellant was directed to limiting the action of Counsel to merely fighting the case without possessing any authority to settle except by express authority of the client. The judgments referred to above should have a salutary effect upon all parties. Clients are constantly over-anxious about their cases, and over and over again imperil their interests by worrying their advisers, who are sometimes weak enough to yield to the client's suggestions at the cost, as Counsel well know all along, of the client's interests. If it were to be held that Counsel were merely the mouthpiece of the client, there would be little need for Counsel. There would soon be a tendency towards trickery, and of mere money-getting as the chief object of Counsel, which would effectually deprive proceedings in Superior Courts of law of that decorum and good faith which as yet distinguish them. May the day be far distant when false advice, unnecessary keeping up of cases, hesitation to do the right in the course of a trial, subserviency to the client's protestations, shall be detected in the Bar.

CONTENTS OF EXCHANGES.

The Scottish Law Review and Notes of Cases. Vol. IV., Nos. 38 and 39. For February and March 1888. Glasgow: William Hodge & Co.

No. 38. Our Extradition Treaties—Advocate and Law Agent; the Fusion Question from the Scotch standpoint—Notes from Edinburgh—Notes from London—Sheriff Court Reports.

No. 39. Sheriff Berry's address to the Glasgow Juridical Society—The Ardgath Compensation Case—The purchase of Company Shares

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The Canadian Law Times. Index to Vol. VII. Vol. VIII. Nos. 1 and 2. For January and February, 1888. Toronto: Carswell & Co.

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No. 1 (Vol. VIII). The Maritime Court of Ontario—Editorial Review: The Consolidated Reviews; The Index for 1887; Canadian Law Times Calendar; Ontario Legal Chart; Changes in the Law Society Curriculum—Book Review—Hamilton Law Association—Occasional Notes of cases in the Supreme Court, of Judicature and High Court of Justice, Ontario; Supreme Court, Nova Scotia; Supreme Court, New Brunswick; and Supreme Court, Manitoba.

No. 2. Felonious taking in Larceny—Editorial Review; Married Women's property; Wager of Battle; The Consolidated Rules; The Canada Law Journal Review—Review of Exchanges—Occasional Notes of Cases in the Supreme Court of Canada; Supreme Court of Judicature and High Court of Justice, Ontario; Supreme Court, Nova Scotia.

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No. 22. Editorial: Odds and Ends; Extradition Case; Legal Legislation—Selections: Notes of Cases in United States; Servants' Wages during Illness—Notes of Canadian Cases—Dominion Controverted Elections Act—Law Students' Department—Articles of interest in contemporary Journals—Index to Vol. XXIII and Tables of Cases.

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Natal Law Reports. Vol. VIII, Part 6. For November 1887.

Maritzburg, Natal: Horne Brothers (for the Natal Law Society).

Reports of cases in the Supreme Court of Natal, with Index and Table of Cases to Vol. VIII.

Themis. Vol. XLIX No. 1. For January, 1888. The Hague. Belinfante Bros.

No. 1. Law of the Netherlands: Constitutional Law, Sections 8 and 18 of the law of the 21st Dec., 1861 (J. B. Braukelmann, The Hague)—Criminal Law and Procedure. Further observations respecting Sections 37, part 2 of the Criminal Code (J. H. André de la Porte,

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TO CORRESPONDENTS.

INQUIRER.—The Magistrate was wrong. Section 32 of Schedule B of Act 20 of 1856 refers to actions in which the party complaining neglects to appear, and it concludes by saying that the judgment, when given in favour of the defendant, *when pronounced after the hearing of the cause*, is a perpetual bar to any other suit or action for the same cause. Absolution from the instance is not such a judgment in favour of the defendant, and is no bar to further action.

JUVENIS IN DUBIO (4. C.L.J., 346).—We may further refer you to the case of *Kingon v. Pedersen*, decided in the Supreme Court and reported in the *Cape Times* of the 1st February, 1888. The Chief Justice there said it was quite clear that the 17th Section was intended to apply to insolvencies which took place before the passing of Act 38 of 1884.

NOTES.

WE take over the following from *Themis*, published at the Hague:—Misschien meer dan deze Amerikaansche rechtsbeschouwingen zal in Nederland de aandacht trekken *The Cape Law Journal*, dat te Grahamstown bij Josiah Slater uitkomende, voor 10½ shilling per jaar, vooruit te betalen per postwissel, om de andere maand een nummer levert, dat zoowel eventueele nieuwe wetten bevat, b.v. April 11. die op het delven van goud en edele gesteenten in de Transvaal, als ook beschouwingen, jurisprudentie, critiek enz. De frequente toepassing van oud-Hollandsch recht in Zuid-Afrika maakt dit tijdschrift minder voor Engelschen in andere streken belangrijk, maar meer voor Nederlanders. Zeldzaam zijn de gevallen waarin dat op 't Romeinsche recht gegronde stelsel niet meer van toepassing is. Of de duidelijkheid der wetgeving er onder lijdt, zooals de *New Jersey Law Journal* beweert, is een vraag, waarop het antwoord wel best uit de Kaaplanden zelve zou komen!

It is fortunate for the public and also for the profession, that even a member of the Bar can be punished in case he ventures on a course of dishonourable conduct. Mr. Justice KAY recently condemned one Moore, who until recently was a Barrister in practice at the Chancery Bar, to pay costs of a motion, and to be imprisoned "till further order," for having been a party to imposition upon the Court "by fraud and suborned perjury." The initials of Mr. Moore are not given, but it seems that, having received from a party to a suit certain bonds which were required to be brought before the Court, he became a party to the production of affidavits by the person who delivered the bonds to him setting forth complete ignorance as to where they might be, and alleging that their possession had long ago been parted with. It seems that this Mr. Moore had, prior to these proceedings before Mr. Justice KAY, ceased to practice as a member of the Bar. In the interests of the public it is to be hoped that his Inn of Court will promptly erase from the Roll of the Bar the name of one who has become distinguished by exceptionally disgraceful conduct.

CAPE LAW JOURNAL.

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER VII.

ARRESTS.—PART II.

Next in importance is the writ itself and the arrest, with the proceedings thereon. The form of the writ, which in itself is of the least importance, is given in the 14th Rule of Court. The writ, which stands for a summons in the case (*James v. Webb*, Buch. Rep. for 1870, p. 37, and *Aldridge v. Harcombe*, Ibid., p. 39), should state the sum claimed, and for what, as in a summons; or, as the case may be, state in concise terms generally the plaintiff's cause of action as disclosed on the affidavit, without going into the details of the affidavit.

If, however, the arrest is founded on a liquid document, though it is not absolutely necessary to the validity of the writ that a claim for provisional sentence thereon should be made in the writ (the same as would be made in a summons in a provisional case), yet it is advisable, and it is recommended, that this should be done, as being more favourable to the plaintiff and no harm and less expensive to the defendant, as it will avoid further proceedings in case the defendant should not confess judgment on the return day of the writ (Van Alphen's Pap., 2, ch. 24 and 25); *Rothkugel v. Gorman*, Buch. Rep. for 1870, p. 10; *James v. Webb*, Ibid., p. 37; *Standen v. Clarke*, Buch. Rep. for 1873, p. 27). The writ should be made returnable on some Court day which should not be further off than is absolutely necessary, the nearer the better, especially when the defendant is known and can be at once arrested, or within a reasonable time before the return day, so as to give time to place the writ on the roll;

generally the return day is fixed, if possible, for a provisional day, or for the first Court day after the issue of a writ (Vromans, 1, 1, 25; Wassenaar, chap. 1, § 20; Grotius, *Isagoge*, 1, 5, 10 and *Douce v. Irvine & Co.*, 3 Buch. E.D.C., 184); but a Circuit Court writ must be made returnable on the first day of the sitting of the Circuit Court (Rule 167).

The taxed costs and charges preliminary to issuing the writ must be endorsed upon it by the Registrar, so that if the defendant wishes to settle the writ upon being arrested, he can at once know the amount. In addition to the costs endorsed on the writ, the defendant must pay the officer's caption fee of one pound, and also the necessary travelling expenses out of any town or village (Rule 341; *Wormald v. Zarnikow*, 3 Buch. E.D.C., 360), and also a reasonable sum for any extraordinary extra trouble and expense he may necessarily be put to to effect the arrest.

Formerly there was no provision for the arrest of a debtor by telegram (*Silberbauer v. Ruthven*, Buch. 1868, p. 100), but this may now be done. Upon the receipt of a writ by the Sheriff or his Deputy, he may telegraph to another Deputy stating that a writ has been lodged with him for the arrest of a person (giving name and address) to answer an action or other proceeding, and this telegram shall be a sufficient authority to the Deputy to execute the writ for the arrest and detention of such person in this Colony, until a sufficient time, not exceeding thirty days, has elapsed to allow the transmission of the writ to the place where the defendant has been arrested or detained, unless a Judge earlier discharges the defendant. But the Judge may also, upon good cause shewn, order the further detention of the defendant for a period of sixty days (Act 41 of 1882, § 2). Of course, upon the arrival of the writ, a copy of it must be served on the defendant.

A writ of arrest intended to be returnable in the Supreme Court can be issued only out of the office of the Registrar of the Supreme Court. But a writ issued out of the Supreme Court may be made returnable in any of the lower Courts having jurisdiction in such matters; and if issued out of the E. D. Court, or High Court of Griqualand, may be made returnable either in those Courts or in the Circuit Courts within their respective Provinces. But a writ issued out of the Circuit Court can be made returnable only

in that particular Circuit Court, and not in any of the higher Courts. If issued in the three highest Courts here named, the writ must be signed by the respective Registrars thereof; if issued in a Circuit Court, then it may be signed by any of the Registrars of the three highest Courts in their respective jurisdictions (Rule 379), or by a Circuit Judge (Rule 164), or by the Registrar of Circuit in such Courts respectively (Rule 162), or by the Resident Magistrate of the Circuit district (Rule 164).

A writ of arrest which was headed in the E. D. Court, and signed by the Registrar of that Court, by order of one of the Judges of the Supreme Court, and made returnable in the Supreme Court, was confirmed by the latter Court on the sole ground that the writ was ordered by a Judge of the Supreme Court, otherwise the E. D. Court, as such, has no jurisdiction to make the writ returnable in the Supreme Court (*Fischer v. Nielsen*, 3 Juta, 370; and *Klippert v. Nielsen* (the same case), Buch. E.D.C., 1).

In issuing a writ of arrest out of the Circuit Court, the Rules of the Supreme Court must be followed (Rule 165), except that a Circuit Court writ must be made returnable on the first day of the sitting of the Circuit Court before which it shall be returnable, unless a Judge orders some other day (Rule 167); and so also in moving for and obtaining the confirmation of a writ, and in moving for the dissolution of such a writ, the Supreme Court practice must be followed.

Immediately upon the receipt of the writ, and without delay, the Sheriff or his Deputy must execute it (Ord. 37 of 1828, § 7); and if, through his neglect, or dilatoriness, or refusal, or without lawful cause or excuse, he fails to execute the writ within a reasonable time, and when he had, or might have, been in a position to arrest the defendant, he is liable to the plaintiff in an action for damages to the amount of the writ, and costs and all other damages sustained thereby (G.P.B., Vol. 8, p. 770, § 27; *Merula*, 4, 24, 9; *Bort*, 6, 4; *Peckius*, chap. 24; *Voet*, 2, 4, 27; *Smith v. Pritchard*, 8, C.B., 565; *Smart v. Hutton*, 8, Ad. and E., 568; consult also *Atkinson's Sheriff*, by Melsheimer, Ed. 6, Chaps. 5 and 7; and *Churchill and Bruce's Sheriff Law*, Chap. 6). But a Sheriff's liability is personal, and does not transmit to his successors (*Davidson v. Seymour*, Mood. and M., 34, note).

Any arrest, whether for security of a debt or to found jurisdiction, must be personal of the debtor, otherwise it would be void; it cannot thus be done by leaving the writ at his house, or with some one there, as might be done with a summons.

A creditor may also personally arrest his debtor, and detain him, more especially if there is *periculum in mora*, or danger that he would abscond and be out of the way before the writ of arrest could be properly issued and placed in the hands of the Sheriff for execution (Merula 1, 8, 1, 11).

As to what constitutes an arrest of a person: It is not necessary that there should be a forcible attachment and detention of the person of the defendant, for as regards the mode of making the arrest, the slightest touch accompanied with a declaration of the object will constitute one (Merula 4, 24, 9, 2); and it is not even necessary that the officer should touch the defendant, provided that the conduct of the parties shew that he is in custody; as, for instance, if the officer come into the room and lock the door (Smith on Actions, p. 318, 9th Ed.; and Chitty's Archibald's Practice, by Prentice, 9th Ed., Vol. 2, p. 701).

Immediately a person is arrested he should be informed of the object of the arrest, and the writ authorising the arrest should be exhibited to him, and a copy of it handed to him; but a copy of the affidavit need not be served, this the defendant can always obtain upon applying to the Registrar (Rule of Court 14, and *Silberbauer v. Ruthven*, Buch. 1868, p. 100).

If the defendant escapes from a lawful arrest, he may be re-arrested at once without a further order of Court, at any time and at any place, and in any way the Sheriff or his officer can best get hold of him; and he may for that purpose break doors if necessary (*re Wood*, decided Supreme Court, April, 1868, not yet reported).

But the Sheriff is not liable if, after arrest, the defendant escapes without his fault or connivance (Ord. No. 37, § 4). The Sheriff cannot command any bystander to assist him in the arrest; he can order only those duly appointed by him and sworn for that purpose (G.P.B., Vol. 2, p. 1419).

No one may resist or obstruct the Sheriff in an arrest, and if he does so he is liable civilly in damages, and even to criminal punishment (Peckius 31; Bort 6, 6; Stephen's Commentaries,

Vol. 4, p. 306, 5th Ed.; and Chitty's Archibald's Practice, by Prentice, Vol. 1, p. 808, 9th Ed.); and anyone who unlawfully releases one duly arrested, is liable to the plaintiff in the real value of the thing in litigation, besides running the risk of the criminal consequences (Voet 2, 7).

The gaoler must use every precaution not to let the defendant escape from gaol; and if through his negligence the debtor escapes from gaol, he is liable to the plaintiff in an action for the damages sustained. The gaoler cannot release the defendant without a judgment, or consent of parties (G.P.B., Vol. 8, p. 770, § 27; Bort 7, 47, 48, and 8, 30-32; Zutphen, Art. "Arrest;" see Chapter on "Civil Imprisonment.")

In England, if a person is arrested for *suspectus de fuga*, or to find security, he is not to be lodged in the public gaol for twenty-four hours thereafter, in order to enable him to communicate with his friends with a view to obtain assistance from them; but he, nevertheless, during that time, remains in the custody of the Sheriff, and is to be detained in a safe and private place to be approved of by the Sheriff. If he is not making any *bonâ fide* communications with his friends, or attempt towards assistance, satisfactory to the Sheriff, or he intimates, on his arrest, his inability to do so, then the Sheriff must forthwith lodge him in gaol (Chitty's Archibald's Practice, by Prentice, Vol. 1, Chap. 8, 6th Ed.). But with us no such privilege is allowed. The Sheriff, when once he has made an arrest, is bound to imprison; and if upon arrest he unnecessarily delays to lodge the defendant in gaol, he does so at his own risk, and is liable to the plaintiff in an action for damages to the amount of the plaintiff's claim in the suit. And he is not bound to listen to the plaintiff's request to delay the imprisonment after the arrest is made, but if he does so he is liable if the defendant escapes. But of course if, before the arrest is made, the plaintiff or his attorney requests a delay of the execution of the writ, this must be allowed. However, when once the arrest is made, the plaintiff is deprived of all control or say in the matter, except giving instructions as to the withdrawal of the writ. Arrests have sometimes been made in this Colony, and the defendant detained over night at an hotel or a friend's house, to enable him to arrange terms of settlement, but this has been upon the guarantee of the

plaintiff to hold the Sheriff harmless from all loss so long as reasonable care has been taken to secure the safety of the defendant (Peekius, Chap. 24; Christenæus, Vol. 2, dec. 150, n. 6; consult also Instr. v. d. Hoove, Art. 8, and Merula 4, 2, 6).

When once the defendant is lawfully in gaol, he is to be maintained there, in the first instance, at the expense of the plaintiff; and generally is there upon the same terms and conditions, and entitled to the same privileges and liable to the same disadvantages, as are all judgment civil debtors; and if he escapes from thence, then the gaol authorities are liable also, the same as in the case of judgment debtors; nor can he be discharged from gaol without authority of the Court or consent of the plaintiff (see Chapter "Civil Imprisonment.")

If the defendant upon being arrested should offer bail, it is for the Sheriff or his Deputy to decide whether or not he will accept it. He cannot, without good reason, refuse it. The security offered must, however, be reasonable, and must be that of the defendant and another person having sufficient property within the Colony; or it may be any other security, so long as it is reasonable and to the satisfaction of the Sheriff, that the defendant shall appear according to the exigency of the writ, and shall stand to, abide by, and perform the judgment of the Court thereon, or render himself to the prison of the Court in execution of such judgment (§ 7 of Ord. No. 37; and Rule of Court 14; consult also Voet 2, 6, 1, and 10 and 11; Groenewegen, de Leg., 1, 4, 11). The Sheriff ought also to take security not only for the amount mentioned in the writ, and the costs and charges endorsed thereon, but also for £35 or £40 in addition thereto, towards the costs which the defendant may ultimately be adjudged to pay (*Stoll v. Brandt*, 3 Menz., 126; *Hoffman v. Meyer and another*, Buch., for 1876, p. 42). The sum here mentioned cannot be laid down as a hard and fast rule. The general rule of law is that the Sheriff should take also sufficient security to secure the probable costs of the plaintiff in the action; and what this sum may be he must judge according to the nature of the case as disclosed on the writ.

The surety or sureties to a bail bond, in order to be regarded satisfactory to the Sheriff, must be domiciled in this Colony, and therefore no peregrine can be a surety, however wealthy he may

be, unless of course the plaintiff chooses to waive this rule ; and in case of difference as to the stability of a surety, within the jurisdiction where the defendant is to appear, the Court must settle the question as to the sufficiency of the bail offered (Voet 2, 8, 2-7).

In England the plaintiff must decide within four days whether he will accept the security offered by the defendant or not. With us it is the Sheriff, not the plaintiff, who is to be satisfied with the security offered (Rule of Court 14, and Ord. 37, 1857) ; and no time is fixed within which he is to decide thereon, but he must do so within a reasonable time.

If the defendant should pay the amount of the writ, with costs, and the costs of caption incurred thereon, then he is entitled to his immediate discharge from custody, and he is further also free from the arrest, and the arrest is at an end for ever. So also is he immediately discharged from the arrest, whether already in gaol or not, upon his giving satisfactory security to answer the action, and to fulfil the judgment, in terms of the bail bond in Rule 14.

If security is given to answer the action, then there is no necessity for the plaintiff to move on the return day of the writ to have it confirmed (*Ryan v. Abrahams*, Buch. for 1873, p. 93) ; but he may at once, on the defendant giving the security, go on with his action in the usual manner, in terms of the 330th Rule of Court, as if there were no arrest and the writ stood as his summons in the case ; and this, though the defendant does not enter appearance to the action (*Wheelan v. Elliott*, decided Supreme Court, August, 1875, not yet reported). But if the plaintiff does not go on in terms of Rules of Court 20 or 330, or the defendant does not move to have judgment signed against the plaintiff—in terms of Rule of Court 25 then an arrest where bail has been given, if not proceeded with by the plaintiff within a year and a day (by some writers stated a year and six weeks), is interrupted, and the sureties are released from their obligations, and the bail bond is thereby discharged (Berg., Adv. Bk., Vol. 4, Cons. 2 ; Van Zurck, Codex. Batavus, tit. "Arrest" ; Merula 4, 83).

If, however, no security is given by the defendant, then the plaintiff must wait till the return day of the writ, when he should move the Court for its confirmation, and if the claim is a liquid

one, and the writ contains a clause for provisional sentence thereon, then in asking for the confirmation of the writ judgment may at the same time be prayed for provisional sentence, and the defendant will, upon judgment being recorded against him, or if he succeeds in getting the writ set aside, be thereupon discharged from the arrest. If the writ contains no claim for provisional sentence, but the defendant nevertheless confesses judgment for the amount claimed in the writ, whether it be a liquid or an illiquid claim, then he will also be discharged from the arrest upon the judgment being given against him. But if the claim be not a liquid one, or the defendant does not confess to judgment for the amount claimed in the writ, and he declines or fails to give security to answer the action, and it becomes necessary for the plaintiff to proceed with his case, then on the return day of the writ the plaintiff moves for its confirmation, and unless the defendant successfully opposes the confirmation, he must go back to the gaol (for he must be produced in Court, or be duly represented, on the application for the confirmation of the writ) till the case can be tried. But the Court will under such circumstances put the plaintiff on terms to plead within a fixed time and to go to trial by some specified day.

Upon judgment being given on the trial day for or against the defendant, he is entitled to his discharge from prison on the arrest (*Wassenaar* 1, 16, 46; *James v. Webb*, and *Aldridge v. Harcombe*, Buch. for 1870, pp. 37 and 39; *Standen v. Clarke*, and *Ryan v. Abrahams*, Buch. for 1873, pp. 27 and 93; and *Fischer v. Nielsen*, 3 Juta, 370).

But this discharge from prison, on judgment being given against him, does not free the defendant from the debt or from further imprisonment (*Sande* 1, 17, 2). If he does not give security on being arrested, then his imprisonment is only till the judgment is given. If he fails to satisfy the judgment on a writ of execution, then he can be sued for civil imprisonment on the judgment. But if he should again meditate flight before a decree of civil imprisonment can be obtained against him, then he can again be arrested, not under the 8th Rule of Court, but only by an order of the Court or of a Judge; and if the decree of civil imprisonment is already obtained, then he may be arrested by virtue of that decree (see Chapter on "Civil Imprisonment.")

While with us on the confirmation of the writ when the defendant does not give bail he goes back to gaol, the plaintiff is put on terms to bring his action at once; in England the defendant may be detained in gaol for not more than six months before the action need be decided (32 and 33 Vict., c. 62); but there as well as here the defendant cannot be detained in prison on the writ of arrest after the final judgment in the case has been given (*Home v. Druyff*, L.R., 8, Ex. 214).

The object of the bail bond is, as its terms state, "to stand to, abide, and perform the judgment of the Court thereon, or render himself to the prison of the Court in execution thereof." Those who become surety for the defendant should therefore see that he carries out the judgment; or failing it, that he is there and prepared to go to gaol in execution thereof. If then the defendant fails to satisfy the judgment, or he is not at hand to surrender himself to prison when required in satisfaction of the judgment, the sureties under the bond must pay to the plaintiff the amount of the judgment and costs.

On paying the plaintiff, they have of course their redress against the defendant wherever he may be; and this redress must be by action, and not by notice of motion (consult also *Ogilvie v. Norton*, 2 Menz., 79; and *Hoffman v. Meyer and another*, Buch. 1876, p. 42).

A writ may be set aside, with all the proceedings prior and subsequent to the arrest, for a non-compliance with any one of the grounds already mentioned as to the requirements of the affidavit on which the writ is founded, or the power to sue; and also as to any of the other grounds which appear in this Chapter, and also as to those persons or goods that are privileged from arrest, whether temporarily or permanently, or at certain times, or on certain occasions, or at or in certain places, or on certain days.

A writ of arrest may be discharged also when issued out by a person not an attorney, for it would be irregular if he did so (*Smith v. David*, 1 Menz., 544, and Rule of Court 8). And an arrest would be dissolved, and the bail bond discharged, if it is not certain by whom the debt is due (*Roberts v. Andrews and Tucker*, 3 Menz., 127). It would be set aside also if the Court is of opinion that the alleged cause of debt was not satisfactorily established

(*Silberbauer v. Ruthven*, Buch. for 1868, p. 100); also if at the time of the arrest the Sheriff or his officer had not a copy of the writ in his possession to be handed to the defendant (*Ibid.*); also when it is oppressive, or the claim of the plaintiff is monstrous or frivolous, and if he is not likely in an unliquidated claim for damages to have £50 awarded to him (*Roberts v. Tucker*, 3 Menz., 130; and *Saget v. Bataillou*, Buch. 1868, p. 32); also for any informality in the affidavit on which the arrest is founded, or in the power to sue, or not in every respect strictly complying with the 8th and 14th Rules of Court (*Smith v. David*, 1 Menz., 544); also a writ must stand or fall by the original affidavit on which it was granted or issued (*Spiegel v. Eisenbach*, 1 Juta, 226). Also when the person is exempt from arrest; or the grounds upon which the person or the goods are arrested are not for arrestable causes; also if the defendant can clearly prove he did not intend to leave the country, &c.

But a writ will not be set aside because it did not contain the alleged defamatory words or their substance, in an action for libel or slander, of which the plaintiff complains (*Norden v. Oppenheim*, 3 Menz., 140); nor is a person arrested entitled to be released from prison by the mere fact of the surrender of his estate; but it is in the discretion of the Court to release him or not (§§ 22 and 23 of the Insolvent Ordinance; and *re La Corniliere*, decided 30th Oct., 1867, not yet reported).

In setting aside a writ of arrest, the costs, though as a rule in the discretion of the Court, usually follow the judgment; and the setting aside of an arrest sets aside also the bail bond and the subsequent proceedings thereon.

On the return day of the writ, if no bail has been given, the defendant may oppose the confirmation of the arrest; but if he wishes to move for the discharge of the writ, he need not wait till the return day thereof, but may *anticipate* the day of appearance (*Grotius*, Isagoge, 1, 5, 10).

For whatever cause a writ of arrest may be opposed or discharged on the return day thereof, it may be set aside also on the same grounds by *anticipation*. If, on being arrested, the defendant conceives that he has good legal grounds to have the writ set aside, for any of the causes mentioned in this Chapter, he need not wait

till the return day thereof to oppose the application for confirmation of the writ, when made; but he may "anticipate" the day of hearing, and apply to the Court in term time, or to a Judge in vacation, for the dissolution of the arrest, upon giving twenty-four hours' notice thereof, and by setting forth in the notice of motion the grounds or reasons upon which he moves the Court to have the writ dissolved (Rule of Court 135; and *re Hillman*, 4 Juta, 334). The motion is to have the writ set aside; and this, in practice, generally embraces also all the proceedings preliminary, as well as on and subsequent, to the arrest; and when the arrest is dissolved, the bail bond is also thereby discharged (*Roberts v. Andrews and Tucker*, 3 Menz., 127; *Saget v. Bataillou*, Buch., 1868, p. 32).

"Anticipation," in its legal sense, is used in all cases where there is *periculum in mora*; that is, where the case demands immediate attention, such as in matrimonial causes, or in the case of perishable goods, and cannot suffer any delay. But particularly so, as here meant, in the case of a civil arrest, when either the day of hearing is too far off, or the defendant has good grounds to have the arrest set aside, it would be manifestly unjust to detain him unnecessarily in prison; he is therefore allowed to "anticipate," or to shorten, the day of hearing, before the usually appointed time mentioned in the writ, by giving the notice here stated (Instr. v. d. Hooge Raade, Art. 215, 230, and 231; Instr. van het Hof, Art. 207; and G.P.B., Vol. 2, p. 784, § 26, and p. 803, § 96; Bort 6, 27; Merula 4, 3, 5; De Papegaai 1, 22).

The return day may also be anticipated under a Circuit Court arrest, and an arrest made under a Circuit Court process may be set aside by a Judge of the Supreme Court, as the 135th Rule of Court extends also to the arrests under the Circuit Court process; so also may such an arrest be set aside by the Supreme Court, or by the E. D. Court within the area of its jurisdiction. The 166th Rule of Court does not prevent such an application to the Supreme Court (*Harsant v. Olssen*, 2 Buch., App. Cas., 108).

But a person cannot move for the discharge of a writ by "anticipation" on the ground that his estate is sequestrated since the issue of the writ; and he cannot, after sequestration, confess judgment in terms of the writ, as by the sequestration he is divested

of his estate, and has no power to confess. He can, under such circumstances, apply for his discharge from the arrest only under §§ 22 and 23 of the Insolvent Ordinance, and this application he may make even when the plaintiff moves for the confirmation of the writ (*re Davidson*, 5 Juta, 93; and *Hill & Paddon v. Davidson*, 5 Juta, 99).

If an arrest is void merely on the ground of any informality in any of the proceedings, and where the plaintiff might begin *de novo*, he is not liable for anything else beyond the defendant's costs in upsetting the proceedings. But where an arrest is otherwise illegal, and should never have been made, whether because the defendant is privileged from arrest, or the cause is not an arrestable one, or there were not sufficient grounds for an arrest, or in a criminal case, where it is either purely malicious, or for want of a reasonable and probable cause, the defendant has, in any of these cases, an action for damages against the plaintiff for all loss and injury sustained thereby; and in addition thereto, the arrested party has also an action for damages against the Sheriff or other officer arresting him, if he is the wrong party arrested, and mistaken for the defendant in the suit. The measure of damages, in all such cases, is in the discretion of the Court, and no hard and fast rule can be laid down thereon. But it may be mentioned that when a man is falsely arrested for a cause charging him with an act which is also punishable by the criminal law, he generally gets heavier damages awarded to him than if the matter were purely a civil one (Peckius, Chaps. 17 and 18; Gail. de arres., Chap. 13, 5, and Chap. 17; *Cloete v. Bergh*, 3 Menz., 109; *Jacobs v. Evans*, Buch. 1869, p. 29; and *Morens v. Milner*, 1 Buch. E.D.C., 145.)

A lawful arrest has the following general legal consequences:—

- (a.) It induces *litis pendentis* (Bort 7, 1, 2).
- (b.) It prevents prescription (Bort 7, 3).
- (c.) It gives no preference in case of the insolvency of the defendant, except for costs of the arrest (Bort 7, 15, 16, 17; *Academie* 26, 366; and *Van Leeuwen*, R.H.R., 5, 7, 2).
- (d.) It founds jurisdiction.
- (e.) It conserves the thing or the debt.
- (f.) It is a species of execution.

(g.) It secures the attendance of the defendant at the trial; or secures the debt in case he fails to comply with or surrender himself in terms of the judgment.

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(*To be continued.*)

INSANITY IN ITS RELATION TO CONTRACT.

In this paper I propose very shortly to consider the contractual capacity of a lunatic *not so found by inquisition*. From the term "contractual capacity" I shall exclude the capacity to marry, since marriage is rather an institution than a contract. Under the term "lunatic" I shall include lunatics proper—*i.e.*, persons suffering from mental disease in any of its recognised forms—inebriates, and persons of weak intellectual power.

The intrinsic difficulty of the subject has been enhanced by the notorious conflict between the Courts of law and of equity as to the limits within which, and the principles upon which, the contracts of a lunatic might be set aside. It may, therefore, conduce as well to clearness as to brevity if I state, in a series of propositions, and then illustrate, the existing law, reserving for the humbler position of cursory notes any historical comments which may seem desirable.

PROPOSITION I.—A contract is an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act.—Pothier.

PROPOSITION II.—To the formation of a contract as above defined, it is essential that the contracting parties should, at the time of entering into it, understand and be able to form a reasonably free and deliberate judgment upon its nature and effects.

Authorities.—Grotius, De J. B., lib. 2, cap. ii., § 4; Puffendorf 1, 3, 6, § 3. This Proposition is, however, modified by Proposition IV., *q.v.*

PROPOSITION III.—Contractual capacity is not destroyed by the mere existence of (a.) mental disease, (b.) delusion, (c.) intoxi-

cation, or (d.) intellectual weakness—not affecting, or materially affecting, the subject-matter of the contract.

Illustrations.—(1.) *Jenkins v. Morris* (14, Chan. Div., 674, 1880). A leased a farm to B. At the date of the lease, A laboured under the delusion that the farm was impregnated with sulphur, and was anxious to get rid of it for this reason. Rational letters written by A in reference to the lease were put in evidence, and it was proved that in spite of his delusion he was a shrewd man of business. The lease was held valid. (2.) *Lightfoot v. Heron* (3, Y. & Coll., 586). A sold real property to B. At the completion of the purchase B was drinking with C, A's solicitor, and acted without professional advice. The price, however, was fair, and it did not appear that either A or C had designed to prevent B from employing a solicitor. Specific performance decreed. See American Cases, 1 Story, Eq. J., § 231, and *Wiltshire v. Marshall* (14, L.T.N.S., 396, 1866). (3.) *Orsmond v. Fitzroy* (3, P. Will., 129, 1731). *Per curiam*, "Where a weak man gives a bond, if there be no fraud or breach of trust in the obtaining it, equity will not set aside the bond only for the weakness of the obligor if he be *compos mentis*," &c.

PROPOSITION 1V.—A contract entered into by a person apparently of sound mind, or apparently sober, and not known either actually or constructively by the other contracting party to be insane or intoxicated, is valid, if fair and *bonâ fide*, and especially if wholly or partly executed so that the parties cannot be restored to their original position.

Illustrations.—(1.) A purchased annuities for his life from a society which at the time had no knowledge that he was of unsound mind. The transaction was fair and *bonâ fide* on the part of the society. A was a lunatic at the time. *Held*, that after A's death his personal representatives could not recover from the society the premiums paid for the annuities (*Molton v. Camroux*, 12, Jur., 800; *Hassard v. Smith*, 6, Ir. R. Eq., 429). (2.) A contracted to purchase an estate from B, and paid a deposit on the terms that unless he objected to the title within a certain time the same should be considered as accepted. No objection to the title was made. At the time of the contract and of the payment of the deposit, A was a lunatic, incapable of understanding the meaning of the contract,

but this was unknown to B, who made the contract with him fairly and *bonâ fide*. Held, that A could not recover the deposit money as the transaction was to that extent completely executed (*Beavan v. M'Donnell*, 9, Ex., 309). (3.) A bought houses and land of B at a public auction. A was at the time, and to the knowledge of B, so drunk as to be incapable of transacting business. A's contract is voidable, and he may ratify it when sober (*Matthews v. Baxter*, L.R., 9, Ex. 132, 1873).

PROPOSITION V.—Contracts for “necessaries” are in the same position, and subject to the same rules, as other contracts entered into by a lunatic.(?)

Illustration.—A supplies B with necessaries, knowing him to be a lunatic incapable of transacting business. *Semble*, A cannot maintain an action against B on the ground of an implied contract (*cf. In re Weaver*, 48, L.T., 93).

NOTES.—The apparent contradiction of Proposition II. by Proposition IV. demands explanation. For the somewhat circular reason that “no man of full age can be permitted to disable or stultify himself,” the common law denied to a lunatic the privilege, which it gave to his successors in interest or blood, of avoiding his acts on the ground of mental incapacity. Into the various refinements and subtleties by which this absurdity was defended, the luminous reasoning by which it was exposed, or the vexed question how far it was consistently applied by the common lawyers themselves, I do not now enter. The point which I wish to make is, that the necessity of somehow relieving the unhappy lunatic from the practical consequences of this disgraceful maxim fixed the attention of the Courts of Equity upon the conduct of the other contracting party. The lunatic might not set up his own lunacy, said the common lawyers; and equity could not defy the voice of the common law. But equity could, and did, investigate the conduct of the person who had contracted with the lunatic, and if it found there circumvention, undue influence, or fraud, could hold him disentitled to any equitable relief. When the common law maxim was repudiated, and lunacy was recognised as a valid plea in the mouth even of the recovered lunatic, the old equity case law insensibly made its influence felt. The sane contracting party was still before the Courts, his conduct was still the subject of judicial

investigation, and it was held that he should not be prejudiced by a disability of which he neither had, nor ought to have had, notice.

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NOTES ON SOME CONTROVERTED POINTS OF LAW.

III.—THE RENUNCIATION OF THE BENEFICIUM SENATUS CONSULTI VELLEJANI.

Can a woman validly renounce the benefits of the Senatus Consultum Vellejanum in a private document ?

ANSWERED AFFIRMATIVELY—*Oak v. Lumsden*, 3 Juta, 147.

ANSWERED NEGATIVELY—*Whitnall v. Goldschmidt*, 3 Buch. E.D.C., 314.

The question has been raised whether women can become sureties for others, and renounce the benefit of the *senatus consultum vellejanum* in a private as well as a public document. In discussing this question it will be well briefly to follow the history of the Roman law on this subject.

By the *senatus consultum vellejanum* all legal effect was denied to the so-called "intercession" of women as sureties for others. According to the general juristic opinion, however, if a woman did become such a surety, her intercession was not *ipso facto* void; but it was voidable at her instance, on the ground of the privilege accorded to her by this enactment, except in a few cases where she was deprived of this privilege; for instance, where she had acted fraudulently or *animo donandi*, or for her own benefit. Moreover, a woman who had been duly instructed as to the nature of the privilege which she thus enjoyed, could validly renounce the same (Vangerow, *Lehrbuch der Pand.*, III., § 581, p. 153). Some indeed have supposed that she could do so only in a few exceptional cases (Glück XV., § 925, p. 36), but in practice the opinion that she could do so in every case has prevailed.

Justinian afterwards effected a change in the law, by providing that women could not bind themselves as sureties, except by means of a public document, signed by three witnesses (Code, 4, 29, 23). But even if a woman did bind herself in this manner, it was nevertheless still in her power to free herself from her obligation by relying upon the benefit of the *senatus consultum*. So long as she did not bind herself in such a public document her obligation was void, although those circumstances might exist which, under the previously existing law as mentioned above, would have deprived her of her privilege (Vangerow, III., § 581, p. 157; Glück XV., § 924, p. 27). The only exception to this rule was when the woman had received some consideration for her intercession; or when it had taken place *pro dote* or *pro libertate*. And though she bound herself in the proper manner, she might again renounce the benefits accruing to her from the *senatus consultum*. This she could do in a private document; for the legislation of Justinian affected only the intercession of women, and not the renunciation by them of their privilege (Huber, Prael. ad Dig., 16, 1, 14; Fachineus, Controv. Juris., 2, 60; Coccejus, Controv. Jur., 16, 1, n. 14; Vangerow, l.c.; Glück, l.c., &c.) The view, however, of those who have fancied that even according to this later legislation of Justinian, when the intercession was effected in a private document which at the same time contained a renunciation of the privilege abovenamed, then, because the renunciation so effected was valid, the intercession itself was also thereby rendered valid, was almost obviously a wrong one (Peregrinus in Cod., 4, 29, 23; Vangerow, l.c.) Whether accompanied by a renunciation of benefits or not, the intercession effected in a private document was absolutely void.

Probably because the intercession and renunciation would generally be contained in one and the same document, it gradually came to be supposed in later times, and accepted as law by many writers, that the renunciation also should be effected in a public document; and some amongst the older writers have supported that view on the ground that a woman could be induced to renounce the benefits, of which she had the right to take advantage, with the same facility as she could be induced to become surety. This argument, however, has been refuted by more than one writer (Voet 16, 1, 9, &c.)

In accordance with the principles of the canon law, the opinion came to prevail in time that if a woman confirmed her intercession with an oath she could not free herself from her liability by an appeal to the *senatus consultum Vellejanum*; and that even though the formality prescribed by Justinian might have been neglected, the force of her oath was such that she remained effectually bound. Nay, some even went so far as to hold that even if she never understood the nature of the privilege which she had sworn to forego, she nevertheless remained bound by virtue of her oath; but this opinion was shewn by others to be immoral and untenable. It stands to reason that a woman could also effectually renounce her privilege under the *senatus consultum* with an oath.

In countries where the principles of the Roman law were introduced, a public document, though not necessarily signed by three witnesses, was in general therefore required to render the intercession of women valid;* or otherwise a private document confirmed by an oath of the party interceding. The renunciation of benefits could, as already seen, be effected by either a public or a private document confirmed by an oath or not.

The question now arises: Have these formalities which were necessary to the validity of the intercession of women become obsolete and unnecessary in later usage, or not? In discussing this question it may be advisable to refer to some of the best-known authorities on the Roman-Dutch law. It must, however, be remarked that several of the authorities which have been cited in connection with this subject will not be noticed here, simply because they refer to the law of various parts of Germany and of Friesland (where the Roman law was adhered to with some pertinacity), and not to the laws of Holland, with which we have now specialiy to do.

Most authorities on the law of Holland apparently take it for granted, rather than lay it down as law, that the renunciation of the benefits abovenamed can be effected in a private document. Van der Linden (Handboek, 1, 14, § 10) says that in practice it has been accepted that a woman can forego her privilege, and refers in a footnote to Grotius and Van der Keessel (Thes. 496).

* As to the meaning of the term "public document" in Roman-Dutch law, see Voet 22, 4, 2-3.

Grotius simply says they do not enjoy the privilege if, after having been properly instructed, they have expressly renounced the same. It seems natural to assume that here and in the case of other authorities to which reference will be made, the allusion is to the case where the intercession and renunciation are contained in one and the same document. So in the sequel to the Dutch Consultations (Vervolg op Holl. Cons., II., Cons. 102), there appears an opinion of three lawyers in the following case: A woman had bound herself as surety to a promissory note in a private writing, with renunciation in general of all benefits to which she might be entitled by law. The opinion was here given that her obligation was void for the reason that she had thus generally renounced all benefits, and did not specifically renounce the benefit of the *senatus consultum*. If in the opinion of counsel the obligation was void because it was contained in a private writing, this surely would have been advanced as a further reason for the invalidity of her obligation. Van Leeuwen indeed lays down the Roman law without qualification, and takes no notice of the modification brought about by the canon law (Censura Forens., 1, 4, 17, 4). But other writers specifically state that the Roman law in respect of the present question is obsolete; and it seems obvious that the assertions of authorities to the effect that a law has been altered or modified is entitled to be considered of greater weight and value than mere statements of the unaltered law, without mention being made as to whether the law has been altered or not.

Van der Keessel having previously remarked that where the constant practice of the Courts had varied the true intention of the Roman law (as in the renunciation of the *senatus consultum Vellejanum*) one ought not to depart from such practice (Thesis 23), and taking it for granted that under the Roman law the renunciation of benefits as well as the intercession itself to be effective was required to be made in a public document, states in somewhat undecisive terms that in order to render effectual the renunciation of the *senatus consultum Vellejanum*, it ought to be made by a public instrument, without which the engagement itself is void; unless, perhaps, a different rule can be proved to have been adopted in Holland by custom (Thesis 496). In a note he refers to Groenewegen (De Leg. Abrog., ad Cod., 4, 29, 3). Van der Linden in a

note contained in his Dutch translation of Pothier on Obligations (2, 6, 3, § 1, Vol. I., p. 345) remarks: "According to our modern practice it is beyond doubt, and has been universally accepted, that a woman can renounce the benefits of both the *senatus consultum Vellejanum* as well as of the *authentica si qua mulier*, without distinction whether this renunciation was effected by a public or a private writing, and this renunciation has become amongst us such a well-known and universal formula that one might almost doubt whether it were not less absurd to do as King Henry IV. of France did, and altogether abolish the *senatus consultum*." Here also Van der Linden refers to Groenewegen; but from the tone of his remarks it would appear that he wrote from personal knowledge and experience. De Haas, in his Annotations on the Censura Forensis of Van Leeuwen, makes a somewhat similar statement, and also refers to Groenewegen. Voet, too, refers to the same writer in support of the proposition expressly laid down by him in one passage (16, 1, 9) to the effect that by modern practice a public document is not required.

As regards Voet, however, it must be remarked that in another passage (42, 1, 16) he observes that in the case where provisional sentence is prayed a woman may plead the benefit of the *senatus consultum*, except she had renounced the same in the proper manner (*recte*); and in order apparently to shew what is meant by "the proper manner," he refers to Sande's Decisions (the chief authority for the proposition that, at least in Friesland, the intercession should be effected in a public document), and to Wassenaar, who in the passage referred to remarks "but a woman who is sued as surety on a private writing does not get condemned on her acknowledgment of debt if she pleads the *senatus consultum Vellejanum*, even though she may have renounced its benefit therein. But if this has been done in a public writing she may not avail herself of this plea." The one writer seems to refer to the voidness, and the other to the voidability, of an engagement of this nature contained in a private writing; and Wassenaar in another place (Pract. Notar., 2, § 23) says more generally that in order that a woman may effectually renounce the benefits to which she is entitled she should have been made perfectly acquainted therewith by a notary or otherwise, so that she may declare sufficiently to

understand the effect of the renunciation. However this may be, it seems open to doubt whether Voet is quite consistent with himself in the two passages cited, since in the latter passage he seems not only to refer to what was the proper manner of renunciation in Friesland, but also to what was such in Holland.

Groenewegen, in the passage to which reference has already been made, states that by the law of Holland, as well as that of France, a public document is not required for the renunciation, nor (it must be supposed he means to say) for the intercession itself. Groenewegen indeed has been accused of abrogating ancient laws on his own authority (Bynkershoek, *Quaest. Jur. Priv.*, 3, 12), and has been called a *facillimus juris abrogati censor* (Huber, *Prael. ad Inst.*, 3, 21, *responsio ad scholium*; *Id. ad Dig.*, 5, 2, 3, and 18, 6, 2); but when in this case he pronounces upon the practice existing in his own time in Holland, he may be well supposed to speak from personal knowledge. As regards the French law, he refers to Bugnon. It appears that the Roman law respecting the *senatus consultum Vellejanum* had been adopted in some of the ancient provinces of France (Story, *Conflict of Laws*, I., § 15, p. 17), and that in some parts of France it had been abolished again, whilst in others it remained in full force (Pothier, *Oblig.*, 2, 6, 3, § 1, [388]). Christinaeus, to whom reference has been made as if he referred to the law of France, says (3, 36, 10) that in some places the *senatus consultum* had been again brought into practice by special edicts (*per edicta in usum revocatum*); but he really refers to the law of Malines, in the present kingdom of Belgium. It would seem that where in France the *senatus consultum* applied the principle was adopted (if we may credit the authority of Christyn, an annotator on Bugnon, and apparently a Belgian) that if the woman was thoroughly instructed as to the privileges to which she was entitled, so that she entered upon her engagement with open eyes, she was held to be bound by her intercession and renunciation, even if effected in a private document (Christyn, note on Bugnon, 1, 40). Groenewegen thus appears to be in accord with what Grotius seems to say, viz., that where the intercession and renunciation has been effected in any way whatever by the woman, after she has been duly made acquainted with her rights and privileges under the law, she is bound by her obligation

in so far as she can be bound at all by any obligation of her own. This rule of law also prevailed in parts of Germany (Leyser, *Med. ad Pand.*, III., Spec. 169, n. 7, &c.)

On a point of this nature the authority of writers on Notarial Practice can hardly be quoted, inasmuch as it was a matter in which notaries themselves were interested; and a practice or formula once well established amongst them "died hard." Leybrechts, however, a notary himself and a well-known writer on Notarial Practice, though he regards a public document as necessary, adds that others are of a different opinion as regards the case where a woman, with a perfect knowledge of her privileges, has renounced them, but that to avoid uncertainty and litigation it is best to make her do so in a notarial deed passed in the presence of witnesses (*Red. Vert.*, 2, 34, § 16).

Hitherto we have confined ourselves to the suretyship of women on behalf of other persons generally. It is well to examine in connection with that subject the cognate one as to the validity of their suretyship on behalf of their own husbands.

By Roman law women were positively prohibited from becoming sureties for their husbands. Justinian ordained (*Novell.*, 134, 8) that the suretyship of women on behalf of their husbands, whether by means of a public or a private document, should be absolutely void, unless it was proved that the woman derived the advantage of the money advanced herself. This enactment has been usually cited, for some unknown reason, not from the Novels themselves, but from the *Authentica*, or summaries of the glossarists, as the *Authentica: si qua mulier*. The special circumstances which as remarked at the commencement of this paper, deprived women of the benefits of the *senatus consultum Vellejanum* did not, however, deprive them of their privilege under the *Authentica*.

In accordance with the principles of the canon law again, so much weight was attached to a contractual oath that the intercession of a woman on behalf of her husband, when effected under oath, was considered of binding force; and so also the renunciation under oath of her privilege under the *Authentica* was legally binding (*Goudsmit, Pandektensysteem*, II., § 40, p. 132, &c.) With reference to the *Authentica*, therefore, the question ought not so much to be whether the benefit to which the woman was entitled

under it could be validly renounced in a private or only in a public document; but whether this could be done in a document unconfirmed by an oath as well as in one so confirmed. Most German jurists seem to have held that such an oath was necessary; some considered that also an affirmation in a certain form instead of an oath would suffice; others considered that an oath had become altogether unnecessary (Glück, XV, § 925, p. 47). As regards the Roman-Dutch Law, Voet holds that the oath was not indispensable to the validity of a renunciation of the *Authentica*. It is generally agreed that in modern practice the intercession of women for either their husbands or others, does not belong to the forbidden class of transactions; but it is merely a transaction to which the law ordinarily denies any legal effect. It must be remarked that in consequence of the marital power of the husband over the wife by our modern law, the *Authentica si qua mulier* is no longer applicable except where the husband's power has been limited by ante-nuptial contract (Matthæus Disput. de Matrim. et tul, p. 598; Groenewegen de Leg. Abrog. ad Cod. 2, 29, 15).

It has been already shewn that in accordance with the principles of the Canon Law the intercession of women for their husbands as well as for others was considered valid and binding when confirmed by oath; and this undoubtedly constituted a departure from Roman Law. According to Potheir the confirmation of contracts by oath has been discontinued in modern times (Oblig. 1, 1, 1, 8 [104]). Voet however treats of the contractual oath (12, 2, 5), but his treatment of the subject may perhaps be more theoretical than practical; as Groenewegen before his time had already remarked that less use was in his time made of extrajudicial oaths and less weight was attached to them. Certainly at the present day contractual oaths are quite unknown. At the present day too, it may be remarked, the law with reference to the form of renunciation of the benefit of the *senatus consultum Vellejanum* and of that under the *Authentica si qua mulier* has been quite assimilated. It is possible, therefore, that when once a departure from the Roman Law had been effected in this respect, that a public document was not required where a private one was confirmed by oath—with the expansion of trade; with the disuse of contractual and extra-judicial oaths; with the diminished

respect with which the authority of the Canon Law came to be regarded; with the growing feeling that good faith should in all things be preserved, and that an unsworn promise should be as sacredly fulfilled as one under oath; with the fact that it is requisite for the validity of such renunciation that the woman who foregoes her privileges should have been made fully acquainted with the effect of her act, so that she acts with the fixed determination to abandon what she could otherwise claim;—the departure from the Roman law, once effected, remained an established practice although the condition under which that departure was first allowed, namely the confirmation by oath, had come to be neglected; and the usage began to prevail that the intercession of women, like the renunciation of rights by them, no longer required in any case to be effected in a public document, as is required by Roman law in the case of suretyship of women for strangers.

The foregoing statement of facts and reasoning thereupon seems to give some countenance to the views expressed by the Court in the case of *Oak v. Lumsden*.

[P.S.—In the *Bellum Juridicum* (Cas. 78), a decision is reported to the effect that a woman is liable as surety, even without the renunciation of the *senatus consultum Vellejanum*; and an opinion of counsel to the same effect is there given, contrary to the opinions of several other lawyers (which are also reported there), but following a case to be found in Stockman's *Brabantine Decisions*. The case referred to in the *Bellum Juridicum* was however decided by one of the inferior Courts; and it seems a curious circumstance that counsel who gave the opinion in accordance with the view of that Court, in favour of the plaintiff in the case, was a Mr. Donker, of Gouda; whilst the plaintiff himself was a Mr. Donker, of Gouda, too! Of course the law is too well established to be any longer doubted that the provisions and principles of the *senatus consultum Vellejanum* were introduced into and actually prevailed in Holland, whatever might be said regarding the provisions of the later legislation of Justinian on the subject as found in the Code.]

M.

DEBENTURES.

For the present at any rate those who desire to see the development of what is known elsewhere as "Company" law may for a time have to turn their eyes to the States of South Africa which are not British rather than to the Courts of the Cape Colony or of Natal. And judging by the rapidity with which mining companies, gold syndicates, and speculations of every kind, go on increasing it is hardly possible, one would think, but that in course of time the Judges of certainly the Transvaal will be fairly well occupied with the consideration of cases arising out of all these numerous undertakings. Contracts, shares, debentures, bonds, notes, trust deeds, the rights and liabilities of shareholders in various circumstances, and many other features common to company cases, may be expected to occupy the Courts in due time, and to form the basis of numerous leading decisions in company law for the benefit of the mining populations in the gold regions and, if less directly somewhat materially, to the advantage of the legal profession in those parts.

Some time ago (in June, 1887) a question arose in the Chancery Division of the High Court of Judicature, before Mr. Justice CHITTY, as to what might be the legal definition of the term "debenture." Did a certain agreement amount to a debenture, and must there be a series of documents called debentures in order to constitute each or either of them a debenture, were questions which were raised and discussed in *Edmonds v. Blaina Furnaces Co.* (57, L.T.N.S., 139). In delivering judgment, Mr. Justice CHITTY doubted whether the term "debenture" had ever received any precise legal definition, although it had been used frequently by lawyers with reference to instruments under Acts of Parliament, which Acts, however, did not refer to such instruments as "debentures." Although, for instance, the debentures of a railway company were often spoken of, the Companies' Clauses Act, 1845, mentions only "bonds and mortgages," not debentures. So also as to the Act of 1862, which mentions only "mortgages" and "charges." It is an expression, said Mr. Justice CHITTY, used frequently in the Law Courts both by Counsel and Judges, and it is a very convenient term, but it has no legal definition.

His lordship then defined the term as importing a debt—an acknowledgment of debt; “and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used, I find that generally, if not always, the instrument imports an obligation or covenant to pay, in most cases accompanied by some charge or security. This obligation or covenant is in most cases at the present day accompanied by some charge or security. So that there are debentures which are secured and debentures which are not secured.”

The case of *The British India Steam Navigation Co. v. The Commissioners of Inland Revenue* (44, L.T.N.S., 375; 7, Q.B.D., 165) was referred to as shewing that both Mr. Justice GROVE and Lord Justice LINDLEY concurred in holding the term debenture to have no legal definition. That case involved the interpretation of the Stamp Act, the question being whether a document was a promissory note or a debenture.

Elsewhere in the judgment referred to above, Mr. Justice CHITTY held that as to what might be a debenture, within the meaning of § 17 of the Bills of Sale Act, 1882, the Court was not bound to hold an instrument to be a debenture simply because it was called a debenture by the company issuing it. The substance of the document must be regarded, and the document in question showed that the company covenanted to pay, upon a particular day, certain sums which certain debenture-holders had assisted to raise, and if any payments less than the whole of the loan should be made they should be made to all the lenders rateably, and the document gave to all the lenders a security *pari passu* upon all its undertaking, property, estate, &c., subject of course to prior charges. In order to be debentures there was no necessity for instruments to be issued and numbered *seriatim*, although as a rule no doubt they were so issued, and each person got his own document. His lordship did not see why a single debenture should not be given to half-a-dozen persons, and still be a good debenture. The case was determined “upon the true nature of the instrument” before the Court.

Almost precisely the same point was discussed some months later before the same learned Judge in *Levy v. The Abercorris Slate and Slab Company, Limited* (58, L.T.N.S., 218), when the case

again turned on the right construction of an agreement made between the company and a lender. Mr. Justice CHITTY again dealt with the question, what was a "debenture," and while repeating some of the considerations which were raised in the former judgment, his lordship on this subsequent occasion expressed the opinion that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture." In the latter case the document in question was not called a "debenture," but that was held to be no sufficient reason why it should not, in effect, be one. It was an agreement, the effect of which was held to be identical with what it would have been had the document been called a "debenture." It was an agreement to pay £600 on a certain day, a charge on certain hereditaments referred to in a schedule, an agreement for the execution of a legal mortgage when called for, and also to issue debentures to the extent of £600, secured upon the goods, chattels, stock, and effects, &c., of the company. As to this part of the agreement, viz., for the issue of debentures, Mr. Justice CHITTY considered that to be not sufficient to prevent the agreement itself from operating as a debenture.

The considerations touched upon in these two cases seem to be worth noticing at a time like the present, notwithstanding the absence from Cape law of anything exactly like the Bills of Sale statute law of England, when company-mongering is spreading throughout the length and breadth of South Africa.

THE BALLOT.

We have in former years offered remarks upon the practice of producing Bills which are likely to be passed into law without much difficulty shortly before or even after the Parliamentary Session has begun. The growth of healthy political spirit in the community would be better assured if proposed measures were put before the constituencies in time enough for those constituencies which might care to do so to master the principles of measures proposed and

perhaps to indicate their inclinations with respect to them. The present session opened on the 25th of May, and only in a *Government Gazette* of May 3 were half a dozen measures of some importance put before the public for the first time. Among these is a "Bill to make provision for taking votes by Ballot at certain elections of Members of the Legislative Council and House of Assembly." In some civilised communities any proposal to alter the existing method of taking votes at Parliamentary elections excites a good deal of attention and of comment. To give much attention to a proposed measure the public must be somewhat keenly alive to its own supposed interests, and if a public is known to be on the alert with regard to legislative proposals a Government is slow to take any step which may seem to presume indifference or acquiescence on the part of the public. But apparently the time has not yet come when our public shall care to trouble at all about the principles involved in Bills before Parliament, at all events to nothing like the same extent, as is the case with measures relating to questions and proposals of a fiscal rather than of a general or abstract nature. For instance it cannot be doubted but that a proposal to tax incomes, to re-impose an Excise duty, or to increase House Duty would give rise to a good deal more discussion, not to say excitement, than a proposal only to alter the system of voting at the election of Parliamentary representatives. After arguments extending over a long series of years, the vote by Ballot has only recently been adopted in England. The principle was one of the six points which comprised the programme of the famous organisation known as that of the "Chartists," whose proceedings assumed such formidable proportions between the years 1838 and 1848 inclusive. Nevertheless this, with one other of the six points, which was for a long period of years regarded as a proposal of almost revolutionary tendency has since become law, and that it has met with general acceptance there can be little doubt. Any proposal to revert to the former state of things would be condemned without hesitation. The Ballot has not formed the subject of public discussion in this Colony, and there is very little likelihood that it ever will. The measure will probably become law without much question in either Chamber of the Legislature, and voters in the constituencies affected will only note that they record their

votes after a new fashion. The Bill is intended to affect only the constituencies of Capetown and of Kimberley in elections for the Assembly, and the Electoral Provinces for the Council of which those two important centres respectively form part. The argument of those who bring this measure forward would, presumably, be that to an extent far greater than in any other considerable towns of the Colony, bribery and undue influence prevail at Kimberley and Capetown respectively in connection with Parliamentary elections. It is not long since an election at Kimberley formed the subject of trial on an election petition, and it may well be that the circumstances then disclosed, although not amounting to sufficient to invalidate the election, nevertheless served to indicate facilities for the exercise of corrupt practices, which ought to be guarded against by all possible means.

But it is not desired to question the wisdom of introducing a Ballot Bill so much as to question the wisdom of limiting its scope to the two constituencies named. There is surely every reason why, if the Parliament of this Colony desires to affirm the principle of vote by Ballot with regard to two constituencies, it should go further and declare the principle to be one which may properly be acted upon as to all constituencies without exception. It is generally recognised, now, that a man's political opinions may be, if he desire that they should be, matters of conscience, and further, that provided a man is able to record his vote without fear of censure or annoyance from any quarter, he is far more likely to record an honest and deliberate vote. And influence of a certain kind affects voters in many small constituencies, just as much as is the case in large industrial centres. A majority of one in a small constituency will return a member, and if that majority of one has been secured by any influence of an "undue" character, just as much harm may be supposed to result as would follow the return of a member or members in a very large constituency where also undue influence or any influence might be brought to bear. That the same or very similar facilities for the exercise of undue influence prevail in very small, as well as in very large, constituencies there can be no doubt. It is not alone a question of large employers of labour influencing their employees, influence and even terrorism are particularly effective in very small

towns and districts, particularly where there may happen to be some leading business man who lends money, gives credit, and generally supervises the affairs of his locality. It is no easy matter for farmers, for instance, to walk into a polling station and openly vote on the side opposed to their creditor who, either in person or by his representative, is present to watch the proceedings. Some of the constituencies are made up of several districts, which cover together a wide extent of country. Each component part of a constituency so situated is distinctly liable to be influenced by one or two leading people, at any rate every one knows how every one else votes, and thus complete independence is barely possible in the case of those whose financial or social position renders them dependent upon any.

There is thus, it appears, abundant reason why, if any Ballot Bill is to be brought forward at all, the Bill should not be limited to only two constituencies. Reasons in support of vote by ballot in any constituency do undoubtedly apply to the case of even the smallest of constituencies. As regards the Bill itself there is little to be said, it is generally speaking a paraphrase of the English Ballot Act applied to this Colony. Voting by ballot demands of course a somewhat larger measure of caution and attention to various details on the part of those in charge of polling stations, on the part of Returning Officers (particularly in the matter of accepting or rejecting voting papers), and, last, but not least, a modicum of intelligence on the part of registered voters. It has been sometimes said that one reason for retaining the present system of what is practically open voting at elections is to be found in the ignorance of a large proportion of voters. Having regard to the thousands of pounds voted annually in the cause of education, this would appear to be a somewhat undesirable argument to advance. Yet it will very probably be found that a great number of "rejected" voting papers will be reported by the Returning Officers of both Capetown and Kimberley, so that again it is seen how an argument for or against the adoption of vote by ballot in any one constituency hold equally good as regards all the rest. So, if deficiency in education is to be an argument against vote by ballot in less populous districts than those of Capetown and Kimberley, it may be advanced with equal strength with reference to each of these two towns. The Ballot

is a very little more complicated system than open voting and then any little complication there is, is met with more by the officials who conduct the election than by the electors themselves. A very little attention to the requirements of the Act must however suffice to instruct the dullest of intellects in the duties which have to be performed. The real boon which vote by ballot affords, is found in the complete secrecy with which votes may be recorded. Any community, one would think, can afford to do without the votes of electors who are so ignorant as to be unable to distinguish the printed names of Tom, Dick, or Harry, and having succeeded in distinguishing them, to fail to grasp the simple process of putting a mark against the name of the favoured candidate. But the absolutely illiterate voter is allowed to instruct the polling officer to record his vote for him, after he has made a declaration "of inability to read." It is only the muddle-headed class which is really affected by a Ballot Act, and these, it is well known, constantly record their votes for more than the proper number of candidates, they constantly write "Yes" or "No" against a name for which they may or may not desire to vote, and as constantly they affix perplexing hieroglyphics which render the voting paper "void for uncertainty."

As we have already observed, it seems strange that the proposal to initiate the Ballot in this Colony, notwithstanding it is to be limited in the first instance to only two important constituencies, should not have called forth any expression of public opinion upon the general question. But wherever the Ballot may be introduced, it is bound to result satisfactorily, so far as the securing the fair and free expression of opinion on the part of electors is concerned. While, however, the subject is before Parliament, we could wish that Parliament would favour the extension of the Bill to all constituencies without exception. Abuses there must needs be even in spite of the protection which a Ballot Act affords, but there can be no question as to the immense diminution of bribery and pressure of all kinds as well as of the technical "undue influence," when a Ballot Act is in force.

REVIEWS.

THE ELEMENTS OF JURISPRUDENCE.*

As mentioned in our last issue, we have received for review, from the Delegates of the Clarendon Press, the new edition of Professor Holland's work on Jurisprudence. That a fourth edition should be already required of a book first published in 1880 is in itself sufficient proof of a widespread recognition of its merits; and a treatise which has already become an authoritative textbook requires no elaborate description or critical analysis at our hands. The study of scientific jurisprudence in England has of recent years made considerable advance, in large measure owing to the stimulus given to its investigation by the suggestive writings of Sir Henry Maine. Such works as Bentham's "Fragment on Government" and Austin's "Province of Jurisprudence" cannot indeed be regarded as superseded or obsolete. But in the case of jurisprudence, as of other branches of science, progress is the law of existence; the dry bread of Austin scarcely furnishes a sufficient, or to most palates a very appetising, diet; while of Bentham it has been observed that his work may be compared to a shell which lies buried in the ruins of the edifices it has shattered. Professor Holland in the present treatise has made a useful contribution to the task of reducing legal rules to scientific classification. After dealing with "Law and Rights" in general, he proceeds to apply his principles to the spheres of Private, Public and International Law respectively, the latter branch, which may be regarded as the Professor's special domain, being rather neatly described as "the vanishing point of jurisprudence." Mr. Holland's methods and terminology may in more than one respect be open to criticism, but no student can fail to profit by a perusal of his work, and to the lawyer at the Cape, the conditions of whose practice demand acquaintance with both Roman and English sources, it should prove in many ways extremely useful.

* *The Elements of Jurisprudence.* By T. E. Holland, D.C.L. Fourth Edition. Oxford: 1888.

We would indeed venture to suggest to our University authorities whether, instead of the two papers on Maine's "Ancient Law" which, together with one on Austin, have for some years been set in the "General Jurisprudence" branch of the preliminary LL.B. examination, one paper on Maine and one on Mr. Holland's book might not in future be advantageously prescribed. One special merit of the volume before us is that it has been kept well up to date and, as the author puts it, "care has been taken to introduce as much illustration as possible from recent English cases, in which one seems to remark a growing tendency towards scientific generalisation." For instance, in dealing with the theory of "contributory negligence," we find duly recorded the important decision of the Court of Appeal, in January, 1887, in the case of *The Bernina*, by which *Thoroughgood v. Bryan*, "after a currency of forty years," was at length over-ruled, a decision which, it may be here added, was confirmed by the House of Lords, since the publication of this book, on February 24th last. The remarkable doctrine of "identification," thus finally disposed of, affords a striking illustration of the way in which in English law phrases have too often been made to do duty for principles, and of the stubbornness with which, when once established in possession, they resist eviction. As another example we may take the decision of the House of Lords in the Scotch appeal of *Sime vs. Caird*, on the interesting subject of copyright in orally delivered lectures, which was pronounced too late for insertion in the body of the work but which we find duly noted in an addendum. To the observations on this subject there might now be added a reference to the recent decision of the Court of Appeal that there is no copyright in the title of a newspaper as such, though the Courts will restrain the infringement of any proprietary right which may be deduced from user and consequent notoriety.⁽¹⁾ An interesting discussion, from a popular but not inaccurate standpoint, of the whole subject of the legal history of literary property, will be found in a paper recently contributed by Mr. Birrell to *Macmillan's Magazine*.⁽²⁾ We will conclude these somewhat discursive remarks by once more commending Mr. Holland's work to the notice of our readers.

⁽¹⁾ *Licensed Victuallers Newspaper Co. vs. Bingham*, C.A., March 21, confirming *North, J.* (See W.N., March 31, p. 72).

⁽²⁾ "Authors in Court," by A. Birrell. *Macmillan's Magazine*, Dec., 1887.

THE LAW OF TORTS.*

To the many works on that branch of English Law known to Lawyers as the Law of Torts, there has just been added a fresh one by Mr. Hugh Fraser, of the Inner Temple, London. The volume in question is more of the nature of a compendium for the use of Students than of a book of reference for the aid of the practitioner. The author tells us in the preface that this work is the outcome of an obligation on his part to supply the students who attended his Lectures at Liverpool with a printed analysis of the same. The book, therefore, professes to be nothing more than the rough outlines of lectures delivered under the auspices of the Liverpool Board of Legal Studies last year. The danger of such a publication is that idle or unwilling students may make use of it as a short cut to the necessary amount of knowledge required to enable them to pass a legal examination. Against the use of his work as a mere cram-book, the author takes care to warn the youthful reader; but such warnings are not always regarded by anxious candidates, with that diligent interest which they shew in the text itself. Of less than 130 pages of large print, and blessed with an ample index and plenty of references to all the well-known authorities, such a book, if written with the conciseness and carefulness of this one, must necessarily often take the place in the student's hands of larger and more ambitious works. And if such books are to be written, we know of no one more calculated to fulfil its purpose than Mr. Fraser's. The conciseness and industry of the writer is shewn by the fact that in less than 130 pages he has found occasion to refer to over three hundred reported cases in illustration of the principles advanced by him; and in addition to these reported cases, the reader is constantly being referred to some standard text-book in support of some definition or maxim of the law, as disclosed in the main body of the work. A book however small, written with such care, indexed so fully, and referring to so many authorities, cannot fail to be of service to the practising lawyer; a glance at its pages may often "put him on" to an authority of great benefit to him in the matter in hand, and which in the moment and stress of his daily practice might have

**A Compendium of the Law of Torts.* By Hugh Fraser, M.A., LL.M., of the Inner Temple, &c., &c.; London: Reeves and Turner.

been overlooked. Mr. Fraser can lay no claim to originality, and in no place but one, and that in reference to an apparently unimportant question, does he attempt to open up any fresh ground, but contents himself with a summary of the law as he finds it to his hand in the Law Reports, or the larger works of other writers. Such a summary is always of use to the Student, and often welcome to the over-pressed practitioner who wishes to be directed to the best sources of information on this branch of Law.

We have also received:—*Fifth Report of the State Committee on Lunacy of the Commonwealth of Pennsylvania*. September 30, 1887. Harrisburg: Edwin K. Meyers, State Printer, 1888. Attached to this report are valuable Appendices together with plans.

Catalogue of Law Works published by Stevens and Sons. London: February 1888.

DIGEST OF CASES.

SUPREME COURT.

[Most of these decisions will appear in full in *Juta's Supreme Court Reports*.]

Passaramadoo v. Morris.—(Feb. 29, March 12).—A monthly servant who by misconduct or desertion, wilfully puts an end to his contract of service during the currency of the monthly period, is not entitled to any wages for the part of the month during which he rendered his services.

Haupt v. Van der Heever.—(March 12).—Spouses by mutual will bequeathed their farm to their children, giving the survivor a life interest in the property. The mother died, and the surviving father, in whose name the farm stood registered, raised a loan thereon on bond. The creditor obtained provisional sentence on his bond, but the children objected to the farm being declared executable. The Court declared one half of the farm only to be executable, leaving the bondholder to raise the question by action, as to whether or not the remaining half of the farm was also executable.

Queen v. Naude.—(March 12).—The conviction of husband and wife of illicit diamond buying confirmed, there being evidence to show that the wife took an active part in the transaction, and was not acting merely under the coercion of her husband.

Queen v. Hendrichs.—(April 12).—There is no general law requiring the burial of the dead in a public place. The conviction of accused for concealment of birth, founded mainly on the facts that she had denied to a constable that she had given birth to a child, and that the body was afterwards found interred in a garden, quashed; it being proved that the accused had been attended in her confinement by a mid-wife, and that her friends and relatives were present and had arranged for the interment of the body.

Broers, N.O. v. Ross.—(April 12).—Judgment had been given against M in an action brought by him as guardian of his minor children, against the present plaintiff. M obtained leave to appeal to the Privy Council, and the present defendant executed a bond jointly and severally binding himself with M for the payment of the costs of appeal. The appeal was dismissed, and on a writ taken out against M, he made a return of *nulla bona*, but stated there were assets belonging to his children in the possession of a third person. The plaintiff thereupon sued the present defendant, who objected that there had not been proper excoession of the principal debtor, but the Court gave judgment against defendant with costs.

Van Rooyen v. Goiman.—(April 12).—Husband and wife, married in community, by mutual will nominated each other and their children their heirs, and specifically bequeathed their farm to their children, subject to the life interest of the survivor. The wife died, and the husband distributed the movables, but did not claim or take the share due to him by the will. He subsequently passed a bond on the farm, which stood registered in his name. The bond creditor obtained judgment, and claimed to take the property in execution. The children objected, and claimed the farm under the will. The Court held there was no proof of adiation, and granted execution against one half the farm only.

Re Labuschagne.—(April 12).—A will containing the usual reservatory clause, was signed at the end thereof by the testator and witnesses, but was not signed and witnessed on every leaf, and was consequently invalid. A codicil purporting to be made under the reservatory clause of the will, was subsequently executed duly attested. *Held*, that the codicil by referring to the informally executed will could not validate it. Query: Whether or not the codicil was valid, standing alone. [Not decided.]

Finlay v. Douglas.—(May 15).—Defendant executed a mortgage bond over his farm in favour of plaintiff. Defendant afterwards sold his farm, and plaintiff agreed to take a bond from the purchaser on his receiving transfer. The purchaser never completed his contract, nor did he take transfer. Plaintiff now sued defendant on his bond. Defendant pleaded novation, but the Court gave judgment for plaintiff as prayed.

Wilman & Spilhaus v. De Wahl.—(May 15).—Plaintiffs sued on a promissory note given to them by defendant. When produced in Court the note was unstamped, but it had never been negotiated. Plaintiffs fined £1 for not duly stamping the note.

Skippon v. Capetown Town Council.—(May 15).—The Town Council gave applicant permission to put a hoarding up in a business street of the city, round a new building which was to be erected, such hoarding to be removed as early as possible. Before the completion of the building the Town Council ordered the builder to remove the hoarding by a fixed day. The builder objected that it would be dangerous to the public to remove the hoarding so soon, and the Council thereupon took steps for its removal by their own servants. The builder applied for an interdict to restrain the Council. It was not alleged that there had been any unreasonable delay or negligence on the part of the applicant in proceeding with the building. The Court granted an interdict for a month, by which time the applicant expected to be able to remove the hoarding with safety, with costs.

Re Morkel.—(May 16-23).—One M had suffered a paralytic seizure, which incapacitated him from managing his affairs, or from expressing himself either by speech or in writing. An action was pending against him, and his affairs otherwise required attention. Application was made for the appointment of a *curator bonis*. The Court appointed a *curator ad litem*, and after service of a rule on such curator and on M, appointed a *curator bonis* for three months. (See *In re Filmer*, Buch. S. O. Rep., 1875, p. 2.)

Knoesen v. Barnard.—(May 16).—Plaintiff sued in the Court of Resident Magistrate for lying-in expenses, &c., in connection with an illegitimate child of

which plaintiff alleged the defendant was father. Defendant denied the connection, and attempted to prove absence on the alleged dates of intercourse. There was corroboration of the woman as to dates and in some other particulars, but not as to the main accusation. The Magistrate gave judgment for plaintiff. Defendant appealed. Appeal dismissed, there being evidence *aliunde* to support the woman's oath, and to lead the Magistrate to give credence to it over the oath of the man.

Breda v. Town Council of Capetown.—(May 17).—The Town Council, under authority of Acts of Parliament, expropriated a piece of land for a reservoir belonging to the entailed estate of Breda, of which land the Council took transfer, but paying interest half-yearly on the purchase price to the beneficiary under the entail. The Council also took certain of the water rising on the estate, for which they paid a yearly sum to the owner of the estate. Under the Municipal Act the Council were entitled to assess a rate on immovable property. They rated both the land expropriated and the estate including the water. Breda brought the assessment in appeal. *Held*, that as the dominium in the land on which the reservoir was constructed was vested in the Council, Breda's estate could not be rated in respect thereof; but as to the remainder, a servitude only had been created, and in valuing the estate the remuneration received for the servitude could be considered.

Betz v. Worcester Exploration Co.—(May 23).—The defendant Company resolved to increase its capital by the issue of new shares offered to the public. Plaintiff, who was a holder of 20 shares, applied for 40 new shares. The directors allotted to the original shareholders new shares to the extent of five-sixths plus one seventh of their former holdings. The plaintiff was thus entitled to 19 new shares. To another shareholder, holding 35 original shares, 33 new shares were allotted. The Secretary, through a clerical error, in the letter of allotment sent plaintiff, stated 33 new shares had been allotted to him, and to the other shareholder he advised 19 new shares had been allotted. The error was shortly after discovered, and a corrected letter of allotment was sent plaintiff. Plaintiff, however, insisted on receiving the full 33 shares, and sued for their delivery in the Magistrate's Court, where judgment was given against him for all shares over the 19. An appeal against this judgment was dismissed. The plaintiff had not re-sold the shares or suffered any damage or loss through the clerical error.

Campher v. Marnitz.—(May 28).—Where an appeal has been noted from the judgment of a Circuit Court, it is competent for the Supreme Court, though there are not three judges sitting, to hear and determine on an interlocutory application.

EASTERN DISTRICTS' COURT.

Tharatt v. Johnson. (Dec. 1, 1887).—Where after summons was in the hands of the R. M. Clerk, defendant tendered £3 in full satisfaction of claim for damages for plucking feathers from plaintiff's ostriches, but when case came into Court pleaded the general issue and "as a special plea should the allegations in the summons be proved, a tender of £3," and the plaintiff was compelled to call his witnesses to prove the damages: *Held*, that the Magistrate was wrong in giving judgment for £3, plaintiff to pay all costs.

Kaffrarian Building Society v. Hay. (Dec. 13).—Where plaintiff Society sued for (a) overdue subscriptions upon certain shares held by defendant in the Society, and (b) for fines due upon such overdue subscriptions: *Held* (JONES, J., *diss.*), that judgment could be given under Rule 329, § (d) for such fines, as Court may imply, defendant being in default, that these fines are not in the nature of a penalty but in the nature of liquidated damages. JONES, J., holding that the fines

being merely damages for the non-payment of money overdue, the amount of the damages proved to have been sustained and not the full amount stated as a penalty could be recovered, and that such damages did not constitute "a debt or liquidated demand" within the meaning of the Rule.

Nicholl v. Nicholl. (Dec. 14).—Where a wife (applicant) moved upon petition for custody of a child of herself and husband (respondent), and it was shewn that owing to certain differences between husband and wife a deed of separation had been signed, but no mention of the custody of the child was made therein, but the child had been almost immediately thereafter placed in custody of the husband and had since been sent to England under the care of respondent's sister, the Court refused to grant the custody of the child to the wife upon motion, though charges of adultery were made against her husband and she alleged a verbal agreement to be permitted at certain intervals to visit her child.

Stumke & Kruger v. Civil Commissioner of Jansenville. (Jan. 12).—Where the applicants *bond fide* purchased in June, 1887, a farm for £900 and tendered transfer dues payable on that amount, and Civil Commissioner insisted upon payment of dues on Divisional Council valuation (£1,600) made three years before, and appointed the same valuator to value again and he valued at £1,400, and it was shewn that the farm had in Dec., 1886, been sold by public auction for £860, and that the valuation at £1,400 was clearly excessive, the Court reduced the valuation to £900 and ordered the Civil Commissioner to pay the costs.

Mundell & Webster v. Fleischer. (Feb. 14).—Where the respondent had committed an act of insolvency and it was alleged that he owed £41 to Webster and that the sum of £100 would be due for rent within one month after the date of application: *Held*, the debts alleged were insufficient to enable application to be made for compulsory sequestration.

Buchanan v. Port Elizabeth Friendly Society. (Feb. 23).—Where the rules of the defendant society prevented anyone being admitted under the age of 18 and over 40, and it was proved that the defendant had by wilfully misrepresenting his age to be 39, when he was in reality more than 40, become a member of the Society; and he sued for damages upon the Society's refusal to grant him the benefits of the Society, the Court gave judgment for defendant society.

Leach, Trustee of Smith v. de la Court Snooke. (Feb. 28).—Where plaintiff moved for judgment upon consent paper filed, and it appeared by the terms of the consent paper that defendant was to pay plaintiff £50, upon condition that the trustee admitted as preferent the defendant's claim upon Smith's insolvent estate, the Court refused to give judgment as prayed, as the rights of creditors upon the estate might be affected.

Per BAREY, J.P.

Queen v. Jan Nero. (Jan. 14, 1888).—In a charge of contravening Section 2, sub-section 8, of Act 18 of 1873, the charge should contain an allegation that the language was calculated to create a breach of the peace. There being no such allegation, no offence is charged.

Queen v. Piet Jantjes. (March 8th).—Where prisoner was charged with contravening Sec. 10, Ord. 24 of 1847, as amended by Sec. 2, of Act 5 1866-67, in unlawfully refusing to work while under sentence of hard labour, proceedings quashed on the ground that the order the prisoner was called on to obey was not a lawful order, inasmuch as it directed the prisoner to do an act for the benefit of the gaoler in connection with his occupation as farmer; an occupation which he is prohibited by Sec. 2, Ord. 24 of 1847, from pursuing so long as he holds the position of gaoler.

Queen v. Mare. (March 15th).—The Marketmaster of Graaff-Reinet is in the habit of allowing persons to dispose of their meat privately on the market place, provided they hand him a list of the sales, upon which market duty is then

charged. On a certain day accused sold meat to one Archer, and afterwards handed a list to the Marketmaster with names of the purchasers, among whom Archer did not appear, although it was uncertain whether the amount of that sale was not included among the sales. *Held*, that it was not proved that accused had exercised the trade of a butcher, following the ruling in *Queen v. Connell*, 1 Jut. 43; it not being proved that the accused either bought the meat or slaughtered it.

Queen v. Stoffel. (May 29th).—Where the accused was convicted of theft of a horse which was found in his possession 2 years and four months after the owner had lost it, and it was not proved that he had obtained possession within a year after it was lost, the Court quashed the conviction on the ground that the possession was not recent; following *Queen v. Adams*, 3 C & P. 600.

Per Jones, J.

Queen v. Herman. (Sept 7).—A was found guilty of the theft of a sheep and sentenced to six months imprisonment and “to pay the value of the sheep to the owner.” The italicized portion of this sentence was struck out and the case remitted to the Magistrate to find definitely after taking evidence the amount of compensation due to the owner of the sheep.

Queen v. David. (Sept 9).—When a Magistrate acted within the jurisdiction conferred upon him, and imposed the heaviest penalty for an escape from beyond the precincts of the gaol; and it appeared to the reviewing judge that the sentence was unusually and unnecessarily severe, *Held*, that the Court had no power to mitigate the sentence. Sentence was therefore “affirmed,” and the record forwarded to the Governor. Portion of the sentence was remitted under the prerogative of mercy.

Queen v. Tom Ntilakotshali. (Sept. 9).—The mere fact of possession of meat not satisfactorily accounted for, without more, does not (under Ord. 19 of 1884 § 1), justify a Magistrate in finding prisoner guilty of theft of a sheep, and imposing a sentence of lashes for a first conviction.

Queen v. George Siho. (December 8).—Where A was charged with wrongfully and unlawfully obtaining from B's canteen a bottle of sherry upon his statement that he had been authorised by E to obtain it, and it was not alleged that this statement was false or fraudulent, and A was convicted upon his plea of guilty: *Held*, no crime was charged, and all proceedings must be quashed.

Queen v. Martinus. (Dec. 14).—Under Act 27 of 1882 § 10, A was charged with using abusive language in a shop. *Held*, that a shop is not such a public place as is intended by the words of this section.

Queen v. Booi. (Feb. 27).—A B & C were charged with theft. A pleaded guilty. B, not guilty. Against A there was sufficient evidence to support a conviction. After sentence A was called as a witness against B and upon his evidence alone, B was convicted of receiving stolen goods well knowing them to be stolen. Conviction of B was quashed.

Queen v. Jantje. (Feb 1).—J while driving some cattle broke a wire fence. He was charged with malicious injury to property, but the Magistrate found him “guilty of breaking a wire fence.” There was no evidence of malicious intent, or of any intention to injure. *Held*, conviction could not be sustained.

Queen v. Jan Nero and Doitje Nero. (Feb. 9).—J and D (J's wife) two servants were charged with wrongfully and wilfully refusing to obey the lawful commands of their master, and pleaded not guilty. It was proved that J was willing to do his work, but his master refused to allow him to do it unless D also did hers. J refused to permit his wife to do this. J was acquitted and D was convicted by Magistrate. *Held*, D's conviction bad.

Queen v. Cornelius August and Jan Grootboom. (May 4).—A B and C hired land for grazing cattle, the rent to be payable in advance. Portion of rent was in arrear. Landowner threatened to impound cattle if rent not paid up fully

and seized cattle. Accused resisted seizure, and re-captured cattle. *Held*, conviction of A B etc. for illegal rescue bad.

Queen v. Jan Moses. (June 12).—Using abusive language "in some lands near a hut" on a farm does not constitute an offence under Act 27 of 1882, § 10.

Queen v. Sam. (June 12).—A pleaded guilty to stealing a mare. The only legal evidence that a crime had been committed was that the mare was missed from the town commonage and was taken by some person, not the prisoner, to a pound. *Held*, not sufficient evidence that crime had been committed.

HIGH COURT OF GRIQUALAND.

[These cases will appear in full in the *High Court Reports*.]

O'Leary and another v. Harbord.—*Practice.*—*Pleading.*—*Exception.*—*Principal and agent.*—*Contract with promoters.* (Jan. 25, Feb. 15).—Where a defendant had excepted to the plaintiffs' declaration on the grounds (1) that the facts set forth disclosed no cause of action against him, (2) that the plaintiffs were not the proper parties to sue, and the plaintiffs had thereupon barred the defendant for not pleading over, the Court granted an application by the defendant for the removal of the bar. A contract for the sale and transfer of a mining lease was made by L with certain guarantors for a projected company, to whose nominees L agreed to transfer the lease. The company having been formed, the trustees sued H for specific performance of this contract, alleging that they had subsequently discovered that H was the undisclosed principal of L. *Held*, on exception, that the facts as set forth disclosed a cause of action against H, but that the trustees of the company not being, so far as appeared, either the nominees or cessionaries of the original contracting parties, were not the proper persons to sue on the contract, and the exception on this ground must therefore be sustained.—*Guerin* for the plaintiffs.—*Frames* for the defendant.—*Attorneys: Knights & Hearle; Coghlan & Coghlan.*

Cowell v. Friedman & Co.—*Pauperies.*—*Negligence.*—*Contributory negligence.* (Feb. 16, 17, 21, March 8).—C while riding along the road was knocked down by a runaway horse belonging to F, and sued for damages, alleging that the horse was known to be a restive animal, requiring careful management, that it was improperly and negligently harnessed and wrongfully and negligently allowed to escape from control. The defendant denied the alleged negligence and pleaded that the accident was due to the plaintiff's own want of care and caution. It appeared that, after the horse had been duly harnessed in the ordinary manner, a bolt broke owing to a latent defect, in consequence of which the shaft became loose and struck the horse, which became frightened and escaped and so caused the accident. *Held*, that it had not been proved that the accident was due either to want of care on the part of the plaintiff or to negligence on the part of the defendant, or to vicious or mischievous propensities or conduct on the part of the horse, and that in these circumstances the action could not be maintained on the ground either of negligence or of pauperies.—*Guerin* for the plaintiff.—*Hopley, C.P.*, for the defendant.—*Attorneys: Dewhurst; Coghlan & Coghlan.*

Palmer v. Rhodes.—*Contract of sale.*—*Custom of share market.*—*Time bargain.*—*Tender.* (Feb. 21).—On November 26 P sold R certain shares, to be delivered and paid for on or before December 14 at the option of R. Two or three days before this contract it had been agreed at meetings of the local share dealers and brokers that "time bargains" such as the above should be paid on the due date within banking hours, but R was not a party to this agreement nor did it appear that he was aware of it. Evidence was led that a custom to the same effect had

existed previous to the meetings, but it did not appear to have been uniformly observed, and several brokers denied that it was either general or notorious. December 14 was a Wednesday, on which day the Banks closed at twelve o'clock, but the share market was open throughout the day. At 11.45 a.m. on that day the broker, through whom R had bought the shares, tendered them to him and demanded payment. R said he could not then pay and requested the broker to ascertain the market price. The broker left and, without again communicating with R, sold the shares on instructions from P. At 3 p.m. R tendered P a cheque for the shares, which was refused, and P now sued him for the difference between the contract price and that at which they were sold. *Held*, that R was not bound by the alleged custom, and had not broken his contract to pay for the shares on December 14. *Held* also, that as P had not objected to R's tender on the ground that it was by cheque, and admitted that he would have equally refused cash, he was not entitled at the trial to object to the tender on that ground.—*Frames* for the plaintiff.—*Feltham* for the defendant.—*Attorneys: Coghlan & Coghlan; H. C. & J. C. Haarhoff.*

Goldberg v. the Queen.—Act 28, 1883, § 75.—*Evidence.*—*Trap.*—*Corroboration.* (Feb. 23).—Where a prisoner had been convicted of an illicit sale of liquor on the evidence of a trap, which was entirely uncorroborated, and it appeared that the trap was accompanied by two other persons, who were alleged to have been present at the sale, but who were not called as witnesses and whose absence was unaccounted for, the conviction was quashed.—*McLachlan* for the appellant.—*Hopley, C.P.*, for the Crown.—*Attorney: De Wet.*

Tilley v. Town, Creewel & Co.—*Insolvency.*—*Discharge.*—*Ord. 6, 1843, §§ 106, 107, 117.* (March 1).—An insolvent who has obtained his discharge under Sect. 106 of Ord. 6 of 1843 cannot be sued by a creditor who has not proved on the estate for a debt contracted before the sequestration.—*Guerin* for the appellant.—*Frames* for the respondents.—*Attorneys: Coghlan & Coghlan; H. C. & J. C. Haarhoff.*

Queen v. Alexander.—Act 13, 1886, § 2.—*Negligence by cab-driver.* (March 7).—On a charge of contravening sect. 2 of Act 13, 1886, it is necessary for the Crown to furnish at least as strong proof of negligence as would be required of a plaintiff in a civil action for damages caused thereby. In the absence of such proof, a conviction under the section was quashed on review. Magistrates, in trying cases under this section, are not entitled to pass sentences exceeding the amount of their ordinary jurisdiction.

Ward v. Griqualand West D. M. Co., Ltd.—*Neighbouring claimholders.*—*Negligence.* (March 12, 13, May 1).—A agreed to sell his claims in a mine to B but retained the right to work them for a certain period. During this period his work was stopped by a fall of ground attributable partly to his own negligence and partly to that of B. If there had been no negligence on the part of B the fall for which A was himself responsible would in itself have been sufficient to prevent him from working the claims or deriving any profit from them during the period in question. *Held*, on these facts, that A was not entitled to recover damages for detention from B.—*Guerin* for the plaintiff.—*Lange* (with *Hopley, C.P.*) for the defendants.—*Attorneys: Rhodes; D. J. Haarhoff.*

Brister & Co. v. Dunning and another.—*Fractice.*—*Pleading.*—*Exceptions.*—*Joinder of defendants.*—*Inconsistent alternative claims.*—*Rule of Court 330.* (March 15).—Where a plaintiff alleged that he had let certain goods to A who wrongfully detained them, and claimed their restoration and damages for the detention, and in the alternative alleged that subsequent to the letting to A he had sold and delivered the said goods to B, on an agreement that the purchase money should be secured by promissory notes to be made by B and endorsed by A, and claimed specific performance of this agreement by A and B; an exception to the declaration, on the ground that the alternative claims were inconsistent and embarrassing,

was allowed with costs.—*Guerin* for the plaintiffs.—*Hopley, C.P.*, for the defendants.—Attorneys: *Playford; Coryndon & Caldecott*.

In re Howell's Estate.—*Executor.*—*Removal.*—*Absence.*—*Ordinance* 104, 1838. (April 10).—Absence from the Colony is not in itself a sufficient ground for the removal of an executor.—*Lange* for applicant.—Attorneys: *Graham & Carlisle*.

Queen v. Zoetwater.—*Act* 27, 1882, *Sect.* 8, *Clause* 5.—*Police Offences.*—*Messenger of R. M. Court.* (April 10).—Hindering the messenger of a Resident Magistrate's Court, in the execution of his duty as such, is not an offence punishable under clause 5 of sect. 8 of Act 27, 1882, even though the messenger happen also to be the Chief Constable of the District.

Mosenthal Bros. v. Coghlan & Ooghlan.—*Arrest.*—*Attorney and Client.*—*Practices.*—*Power to defend proceedings.*—*Rules of Court* 8, 9, 28.—*Judgment debt.*—*Set-off.* (May 1).—M arrested F for a debt secured by liquid documents. The writ having been discharged with costs, F refused to set off his costs against the larger sum which he owed to M and took out a writ for the amount. M paid the amount claimed and thereafter applied to the Court to order C, who was F's attorney in the matter of the arrest but who had filed no power from him to defend the proceedings, to refund the amount so paid. *Held*, that, while the writ ought not to have been taken out and an application to restrain its execution would probably have been granted, it could not be set aside and a refund ordered except after notice to F of the application and that the application against C must therefore be refused. *Seem*, it is unnecessary in motion cases for the respondent's attorney to file a power with the Registrar.—*Frames* for the applicants.—*Hopley, C.P.*, for the respondents.—Attorneys: *Caldecott & Phear; Respondents* in person.

Myers v. Selim.—*Bills of Exchange.*—*Proof of payment.* (May 1, 3).—A, B and C made an arrangement which provided *inter alia* that A should accept certain three bills of exchange, at one, two and three years respectively, which he was to give to B and which were to be held by either B or C and not to be negotiated, transferred or assigned to any third party, A undertaking to "pay or provide for" them at maturity. In accordance with this agreement, and on the same day, C drew the bills to his own order and endorsed them in blank, and A accepted them and made them payable at C's office in London. A afterwards went to Kimberley and duly remitted the amount of the first two bills to C. The amount of the third bill he remitted to B direct, C having meanwhile become bankrupt. B afterwards sued A on the first two bills, which he produced, and A pleaded payment. His evidence in addition to the above facts was that B was a money-lender and C's father-in-law. He also produced a letter from C, stating that he had with B's knowledge kept the amounts remitted to him and that he hoped B would return the bills. There was also a letter from B acknowledging the amount of the third bill and not containing any reference to the former bills. On these facts the Magistrate gave judgment for the plaintiff. *Held*, on appeal (*Solomon, J., diss.*), that the facts proved raised a sufficient presumption of payment or satisfaction to put the plaintiff on further proof, and that the judgment must therefore be altered to one of absolution from the instance, the question of costs being reserved.—*Guerin* for the appellant.—*Frames* for the respondent.—Attorneys: *Deuchurst; Caldecott & Phear*.

Queen v. Saul.—*Theft.*—*Possession.* (May 1).—Where a prisoner had been convicted of stealing a horse, and the only evidence against him was that he was found in possession of it more than six months after it had been lost, and he explained that he had released the horse out of the pound at the request of a third party, who had requested him to keep it as security for the fees, and produced a receipt from the poundmaster which supported his statements, the conviction was quashed.

In re Estate of Goldberger.—*Insolvency.*—*Release.*—*Ordinance* 6, 1843, §§ 26, 107. (May 8, 11).—Where in an estate under £75 in value there had been

only one meeting of creditors, and the trustee then elected had never been confirmed and no account had been filed, the Court refused an application for release under sect. 107 of Ord. 6, 1843, on the ground that no such application could be granted until after the third meeting of creditors had been held.—*Hopley, C.P.*, for the petitioner.—Attorneys: *Coghlan & Coghlan*.

Muller v. L. & S. A. Exploration Company, Ltd.—*Practice*.—*Pleading*.—*Exception*.—*Alternative relief*.—*Inconsistent allegations*.—*Rule of Court 330*. (May 11).—A plaintiff alleged in his declaration that the defendant was in use and occupation of a certain stand by his permission and as his tenant, and in the alternative that the said occupation was against his will and notwithstanding an order which he had obtained for the defendant's ejectment, and claimed alternative relief on these statements; *Held*, on exception, that, while the plaintiff could draw alternative conclusions of law and claim relief corresponding thereto, the declaration as it stood was embarrassing, and must be amended by the omission of the inconsistent allegations of fact therein contained.—*Frames* for the plaintiff.—*Hopley, C.P.*, for the defendant.—Attorneys: *Caldecott & Phear; Coghlan & Coghlan*.

Moir v. Watts.—*Principal and agent*.—*Broker*.—*Commission*. (May 17).—W placed certain house property in the hands of M, a broker, for sale. M introduced K and obtained for him an order to view the property, which at first he declined to buy, but, about a month afterwards, purchased direct from W at a price which was substantially the same as that which W would have received, after deducting M's commission, if the sale had originally gone through. M sued W for commission and the Magistrate, after hearing the plaintiff's evidence to the above effect, granted absolution from the instance. *Held*, on appeal, that the evidence disclosed a *prima facie* case, and that the judgment of absolution must therefore be reversed and the case remitted to the Magistrate for further hearing.—*Hopley, C.P.*, for the appellant.—*Guerin* for the respondent.—Attorneys: *Coghlan & Coghlan; D. J. Haarhoff*.

Bank of Africa v. Craven, N.O.—*Mining Board*.—*Receiver*.—*Act 11, 1867, § 6*.—*Act 18, 1886, § 11*.—*Appropriation of payments*.—*Interest*.—*Acquiescence*.—*Costs*. (May 18).—The debt due by the Kimberley Mining Board upon which interest is to be reckoned, as provided by Acts 11 of 1867 and 18 of 1886, consists of the original debt together with the interest accrued due thereon previous to the filing of their claims with the master by the creditors of the Board. The proceeds of rates levied to liquidate the said debt must be applied in the first instance to payment of current interest and then to reduction of the principal. Where a creditor of the Board had accepted and acquiesced in various payments made on account by the receiver on an erroneous basis, the Court refused to order immediate payment of the balance due on a readjustment of the accounts, but directed the receiver to credit the plaintiff with such balance and follow the correct method in future payments. Where the relief obtained by a plaintiff could have been equally obtained by means of a special case, the Court allowed only such costs as would have been incurred if a special case had been prepared.—*Guerin* for the plaintiffs.—*Lange* for the defendant.—Attorneys: *Caldecott & Phear; D. J. Haarhoff*.

Standard Bank v. Ward.—*Provisional Sentence*.—*Liquid document*.—*Pledge of shares*. (May 23).—Provisional sentence refused on a document pledging shares as a security for an overdraft of a current account with a Bank up to a certain amount, which amount was alleged in the summons to be due and owing.—*Frames* for the plaintiff.—*Guerin* for the defendant.—Attorneys: *Graham, Vigne & Mallett; D. J. Haarhoff*.

Stent v. Gibson Bros.—*Architect's plans*.—*Liability of carriers*.—*Measure of damages*. (May 23).—S, an architect at Kimberley, prepared certain plans and specifications for a hospital, in response to an advertisement from a hospital committee at Pretoria, inviting such designs and offering a premium of £25 for those accepted. The designs, which were marked "to be returned," and of which S

had not been able to make copies, were received by G, a carrier, for transmission and delivery and were lost by him. In an action for damages sustained by the loss, *held*, that the damages were not to be measured by the chance of obtaining the premium offered but by the value of the time, labour and skill employed in the preparation of the plans and specifications.—*Joubert* for the plaintiff.—*Hopley, C.P.*, for the defendants.—Attorneys: *Caldecott & Bell; Dewhurst.*

BARRISTERS AND SOLICITORS.

With reference to an article in our last issue on the amalgamation of the legal profession, the following which was recently addressed to the *Law Times*, by a practitioner in New Zealand, may be of interest:—

As facts are more useful in such discussions as the above, I desire to state, in reference to the question of the cost of preparing briefs, that the fusion which exists in the Colony does not, in practice, supersede the preparation of briefs beyond that comparatively small part known as the "case." It is the common practice here to brief the pleadings, correspondence, and, above all, the proofs, so that immediate reference can be made to any part of the case during the trial without having to fumble at bundles of papers. Of course I am not referring to petty cases, but to causes of the kind which would be considered ordinary business at the English Bar. I may mention that since 1882, costs as between party and party are regulated by a scale, the principle of which is a percentage upon the amount claimed. The fact that a man acts as barrister and solicitor does not necessarily imply, in practice, that he knows all about the case for a long time before the trial. No doubt he knows the main lines of the case, but so does the English junior, who drew the pleadings, and perhaps attended a summons or advised on evidence. Except in very small practices the getting up of the evidence, in all its wearisome multiplicity of detail, is attended to by managing clerks, or articled clerks, under the direction of the principal, and they have practically to "brief" him with the evidence; while, for the reason I have given before, the pleadings and other material documents are also briefed. I have also found in practice that the fact that one may have to put in a letter or other document or plan, or hand the same for inspection to the opposite side, or to a witness, necessitates the practitioner having in his brief or otherwise, a copy of the same,

for immediate reference in the hurry of *Nisi Prius*, when often a point must be made at the instant or not at all. And even if the practitioner has got his case by heart, the matter may be postponed, or become a remanet; so that it is wiser to commit the proofs to writing, in a proper form, while the matter is fresh in mind. In a very few large firms in this Colony, where perhaps besides the partners there are several qualified practitioners acting as managing clerks, the partner who takes the court work practically acts as counsel only, save that he sees clients when they call. I may mention that it is by no means uncommon, even in this young Colony, for a brief to amount to 100 sheets. We have many heavy and very complicated cases in which titles, evidence in a former stage of the case, and voluminous correspondence extending over many years, have to be briefed, equally whether the solicitor takes the case himself or briefs a practitioner of higher standing. It is also the result of my experience, that the strain of responsibility is much greater where the same man has to get up and conduct a case, and I have found that the personal attention (when given) to the getting up evidence of, say, a dozen witnesses in an important case, does not improve one's general view of the case in Court, and that a case standing over four or five days is additionally wearisome if one has given, say, two weeks' almost exclusive attention to the details of the evidence immediately before trial. In other words, there must ensue a loss of freshness and pungency of mind, which, in my opinion, are more important items to counsel than a nauseating knowledge of the remotest details of the case, which simply incumber the mind. I am giving one man's experience for what it is worth. No doubt these matters strike men differently. My own opinion is, that one man cannot satisfactorily attend personally to both branches of the Profession, and that the division of labour between barrister and solicitor is a natural one, and that the duties are quite distinct, and call for quite different natural and acquired abilities. I have before alluded to increased responsibility, and I can well imagine that counsel—where the branches are distinct—must have a far easier time of it in Court than where the professions are united, because in the latter case, if any evidence that ought to have been procured, is not procured, the practitioner conducting the case feels

himself at fault, and has to send for evidence, &c. Again, in a case extending over several days, the practitioner has in the adjournment, and after and before Court hours to converse with his witnesses, put facts to them in an altered light by reason of unexpected evidence having been given, and generally to "shepherd" his case until its conclusion. This kind of work, if done (and no one conversant with *Nisi Prius* business can question its necessity), keeps the mind of the advocate perpetually on the *qui vive* about matters which have nothing whatever to do with advocacy. I have travelled beyond the limits intended, and in conclusion will only suggest that, if any change be made, it shall take the form of allowing a practitioner to engage in either branch, but not in both in the same year, save in cases under a certain amount.

CONTENTS OF EXCHANGES.

The Law Quarterly Review. Vol. IV., No. 14. For April, 1888.
London: Stevens & Sons.

Sir Henry Maine (Sir A. C. Lyall, K.C.B.; E. Glasson; F. von Holtzendorff; and Pietro Cogliolo)—The Story of the Chair of Public Law in the University of Edinburgh (Prof. Lorimer)—Public Meetings and Public Order: II. Belgium (H. Lentz), III. France (Albert Gigot), Switzerland (Prof. H. G. Köing)—Curiosities of Copyright Law (A. T. Carter)—A disputed point in the *Lex Aquilia* (G. Pacchioni)—The Canadian Constitution (J. E. C. Munro)—Reviews and Notices—Notes—Contents of Exchanges.

The Journal of Jurisprudence and Scottish Law Magazine. Vol. XXXII., Nos. 375 and 376. For March and April, 1888. Edinburgh: T. & T. Clark.

No. 375. The Canon Law and Scottish Presbyterianism—Private Bill Legislation, II—Ownership and Property—Commerce and Contracts—A Lay of the Procedure Roll—Obituary—Reviews—The Month—Sheriff Court Reports.

No. 376. Some General Rules of the Art of Legal Composition—Appeals from the Sheriff Court under the Judicature Act, 6 Geo. IV. Cap. 120—Protection of Infants—Ownership in Land: An Historical Sketch—Reviews—The Month—Sheriff Court Reports—Notes of Cases.

The Canadian Law Times. Vol. VIII. Nos. 3—5. For February and March, 1888.

No. 3. Occasional Notes of Cases in the Supreme Court of Judicature, and High Court of Justice, Ontario; the Queen's Bench, Manitoba—Supreme Court, British Columbia.

No. 4. Parliamentary Divorce in Canada—Editorial Review—Reviews of Exchanges—Occasional Notes of Cases in the Supreme

Court of Judicature and High Court of Justice, Ontario; and Queen's Bench, Manitoba.

No. 5. Occasional Notes of Cases in the Supreme Court of Judicature and High Court of Justice, Ontario.

The Canada Law Journal. Vol. XXIV., Nos. 4—6. For March and April, 1888. Toronto: J. E. Bryant & Co.

No. 4. Editorial: Shorter Editorials; Insanity in its relation to Marriage; The Extradition of Criminals; Comments on Current English Decisions—Reviews and Notices of Books—Correspondence—Proceedings of Law Societies—Diary for March—Early Notes of Canadian Cases in the Supreme Court of Judicature and High Court of Justice, Ontario.

No. 5. Editorial: Shorter Editorials; The Land Titles Act; Proposal for a Law School; New Tariff of Fees and Disbursements; Comments on Current English Decisions—Reviews and Notices of Books—Notes on Exchanges, &c—Correspondence—Diary for March—Reports—Early Notes of Canadian Cases in the Supreme Court of Judicature and High Court of Justice, Ontario—Law Students' Department—Miscellaneous.

No. 6. Editorial: Shorter Editorials; Divorce, Separation de Corps; The Fisheries Treaty; Comments on Current English Decisions—Correspondence—Proceedings of Law Societies—Diary for April—Reports—Early Notes of Canadian Cases in the Supreme Court of Canada, and Supreme Court of Judicature and High Court of Justice, Ontario—Miscellaneous—Law Society of Upper Canada.

The Natal Law Reports. Vol. IX., part 1 for January, 1888. Natal: Horne Brothers (For the Natal Law Society).

Reports of Cases in the Supreme Court of Natal.

Themis. Vol. XLIX., No. 2. For April, 1888. The Hague: Belinfante Brothers.

No. 2. (1) Law of the Netherlands. Constitutional Law: The Application of Article 231 of the Common Law of the 26th August, 1822 (M. T. Goudsmit)—Criminal Law and Procedure: Presidential Order of Attachment (A. Heemskerk)—Law containing General Provisions of the Law of the Kingdom (From the Writings of the late D. Leon)—Right of the Insurer to Damages (P. L. Moens)—(2) General Jurisprudence. The Domicile (From the Report of the State Commission of 1886)—On Failure of Payment (M. T. Goudsmit)—Review of the Local Law (N. K. F. Land)—(3) Reviews—(4) Notices.

NOTES.

AN animated controversy has recently arisen in England, in both political and legal circles, with regard to the power of appellate tribunals to increase sentences passed in criminal cases. It appears that some of the Irish County Court Judges, to whom a right of

appeal was granted in certain cases under the Prevention of Crimes Act of last year—in partial fulfilment of Mr. Balfour's pledge that such right should be given in all cases—have recently taken to increasing the periods of imprisonment imposed by the Magistrates and appealed against by the accused. It would seem that under the Irish Act the County Court Judge has the right "to confirm, reverse or vary" the sentences appealed from, while the corresponding provision in cases of appeal in England to Quarter Sessions empowers that tribunal "to confirm, reverse or modify." Between variance and modification the distinction, if any, is certainly a subtle one; but the argument in favour of the action which has been taken by the Judges, and vehemently defended by the Government, is that an appeal under the Act is really a re-hearing, at which fresh evidence is admissible, and that it thus becomes the duty of the Judge to impose such sentence as on the evidence before him may seem right and proper. It is, however, a significant fact that, in the exercise of a corresponding jurisdiction by the English Courts of Quarter Sessions, no precedent has been found for the action of the Irish County Court Judges; and those who defend their proceedings have had to go so far afield in their search for a precedent as India, where it seems that on one occasion a homicide appealed against a sentence of imprisonment, was found on appeal to have been guilty of murder, was sentenced by the appellate Court to be hanged, and was hanged accordingly. It might be added that in France Courts of Appeal have the right to increase as well as to diminish the sentences originally imposed, and we believe this right is not infrequently exercised; but it may well be doubted whether either Indian or French precedents are likely to reconcile public opinion in England, as they certainly will not reconcile it in Ireland, to the somewhat startling innovation which constitutes the latest phase in the administration of the Irish Coercion Act. Surely it may be fairly argued that, to found the jurisdiction thus assumed, there should at all events be a provision in the Act allowing a cross appeal on behalf of the Crown. In the absence of such cross appeal the respondent party is supposed to be satisfied with the decision of the Court of first instance; and in civil cases it constantly happens that an appellate Court holds itself precluded from considering that portion of a judgment

which may have been given in favour of the appellant on the express ground of the absence of such cross-appeal. One would think that by analogy in criminal cases, where the presumption is always in favour of the liberty of the subject, a similar practice should undoubtedly prevail.

WE note that the decision of KEKEWICH, J., in *Williams v. Colonial Bank*, 36 Ch. D., 659, which formed the subject of an article in the February number of this *Journal*, has been reversed on appeal. The Court of Appeal held that, even assuming the American law on the subject to support the contention of the respondent, the case was one governed by English law, that by the law of England the securities in question were not negotiable, and that there was nothing in the conduct of the appellants to estop them from asserting their right to them. The case, which is one of that class where the question is which of two innocent parties is to suffer for the fraud of a third party, was decided on May 1, and will be found reported in the *London Times* of May 2.

AUDITOR'S duties are both important and responsible. It has often been remarked in this Colony that an auditor is merely a servant of the Company appointed to enquire into the accounts with the object of ascertaining that the usual balance sheet corresponds with the books of the Company, and to this is sometimes added the task of checking the vouchers. In other words that his duties are simply mechanical. At a time like the present when so much money is being daily invested in public Companies, it is most opportune that the duties of an auditor should have been accurately defined by a court of law. The recent judgment of STIRLING, J., in the *Leeds Estate Building and Investment Co. v. Shepherd* (L. R., 36 Ch. D., 787) is in this respect very instructive and useful. The Leeds Estate Building and Investment Company was formed in England in 1869 with limited liability. Its articles of association provided amongst other things (1) that when the Company should pay a dividend of 5 per cent., the Directors should receive a fixed sum for each attendance and a further fixed sum for every additional 1 per cent. of dividend; (2) that dividends should only be payable out of profits; (3) that the

Directors should annually lay before the Company a statement of the income and expenditure for the past year; (4) that such statement should shew the amount of gross income, distinguishing the several sources from which it had been derived and the amount of gross expenditure under various headings, so that a just balance of profit and loss might be laid before the meeting. The balance sheet was also to contain a summary of the property and liabilities of the Company; (5) once at least in every year the accounts of the Company were to be examined by an auditor and the correctness of the balance sheet ascertained; (6) "Every auditor shall be supplied with a copy of the balance sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto"; (7) the auditors should make a report to the members on the balance sheet and accounts and in such report they should further state whether the balance sheet was a full and fair one, and contained the particulars required by the articles of Association. It appeared that with the exception of the year 1876, when the Company made a small profit of less than 5 per cent, no profit was ever earned by the Company, and its business was carried on at a loss. Nevertheless the directors declared and, with the sanction of the shareholders given upon the faith of the balance sheets, paid in every year until 1882 dividends of between 5 and 10 per cent., and in 1882 a dividend of $2\frac{1}{2}$ per cent. They paid themselves the corresponding attendance fees and a bonus to their Secretary who by virtue of a resolution passed in 1872 was to receive a bonus of £25 in every year in which sufficient profits should be realised to enable the Company to pay a dividend in excess of 5 per cent. The balance sheets from 1870 to 1880 were audited by an auditor named Locking, who usually gave a certificate in the following form, though in one or two instances it was slightly varied:—"I certify that I have examined the above accounts and find them to be a true copy of those shewn in the books of the Company." The Company went into liquidation in October, 1882. It was insolvent to a large extent and the action was brought by the liquidator in 1885 for the benefit of the creditors. The defendants were the directors, the secretary, and the auditor. The plaintiff claimed (*inter alia*) a declaration that the defendants were jointly and severally liable to make good sums amounting to £3,394 18s 10d

in respect of dividends paid out of capital, £540 2s. 6d. in respect of directors' fees, and £900 in respect of bonuses paid to the Secretary, so far as such sums were paid whilst the defendants were officers of the Company. The Court gave judgment for the plaintiff for the sums specified above with costs. In delivering judgment, STIRLING, J., remarked, "It was in my opinion the duty of the auditor not to confine himself merely to the task of verifying the arithmetical accuracy of the balance-sheet, but to enquire into its substantial accuracy and to ascertain that it contained the particulars specified in the articles of association (and consequently a proper income and expenditure account), and was properly drawn up so as to contain a true and correct representation of the state of the Company's affairs." After pointing out the incompleteness of the accounts, the irregular form in which they were prepared, and after dealing with the liability of the directors, he went on to say that Locking, the auditor, had been guilty of a breach of duty to the Company; he had certified that the accounts were a true copy of those shewn in the books of the Company; "That certificate would naturally be understood to mean that the books of the Company shewed (taking for example the certificate for the year 1879) that on the 30th of April, 1879, the Company were entitled to 'money's lent' to the amount of £29,515 15s. This was not in accordance with the fact; the accounts in this respect did not truly represent the state of the Company's affairs, and it was a breach of duty on Locking's part to certify as he did with reference to them. The payment of the dividends, directors' fees, and bonuses to the Manager actually paid in those years appears to be the natural and immediate consequence of such breach of duty; and I hold Locking liable for damages to the amount of the moneys so paid."

We have given the pith of this case somewhat fully in order that auditors may see that their office is not by any means nominal, but that when they undertake the duty of auditing a Company's balance sheet and accounts, an obligation is at once imposed upon them to carefully see that those accounts are in every respect true and correct; that they truly represent the position of the Company, and that they have been prepared in strict accordance with the provisions of the articles of association.

DIRECTORS may also learn a useful lesson from the decision in the case just referred to (*Leeds Estate Building and Investment Company v. Shepherd*). Their first duty is to acquaint themselves with the provisions of their constating instrument, and when they have mastered that important document they are obliged to see that the capital of the company is applied only for the purposes specified therein. "Directors (as remarked by STIRLING, J.,) are trustees or quasi-trustees of the capital of the Company, and are liable as trustees for any breach of duty as regards the application of it." Their position is in a great measure similar to that of the managing partners of an ordinary trading firm as between themselves and those partners who do not take an active part in the conduct of the firm's business.

The following extract from the judgment of STIRLING, J., in the case before us, in which the Directors were held liable for large sums of money for dividends paid out of capital, directors fees, and bonuses to the secretary, in violation of the terms of the articles of association may further illustrate the responsibilities of directors:—"Upon the whole, although the Directors were, I believe ignorant of the true state of the Company's affairs, and although I find no trace of their having acted with the view of obtaining any improper benefit for themselves, I feel compelled to hold that they have fallen short of that standard of care which, having regard to the *Oxford Case* they ought to have applied to the affairs of the Company in the following respects:—(1) They never required the statement and balance sheets to be made out in the manner prescribed by the articles; (2) They failed properly to instruct the auditor, or, at all events, to require him to report on the accounts and balance sheets in the mode prescribed by the articles, and (3) they were content throughout to act on the statements of Crabtree (the secretary) without inquiry or verification of any kind other than the imperfect audit of the accounts by Locking. Those accounts and balance-sheets did not truly represent the state of the Company's affairs; and that being so I think that according to what is laid down in *Ranci's Case*, the onus is laid upon them to shew that the dividends they paid were paid out of profits. This upon the evidence before me they failed to do."

CAPE LAW JOURNAL.

TITLE BY WILL AND BY REGISTRATION.

RIGHTS OF A SURVIVOR UNDER A MUTUAL WILL.

The rights of the survivor, who remains in possession of property, under the provisions of a mutual will dealing with the whole of the joint estate, have formed the subject of several recent decisions of the Supreme Court. A good deal of criticism has been evoked thereupon, and the question may well be considered as at present one of the most interesting to members of the legal profession. It has been boldly said that the decisions of the Court are absolutely irreconcilable, and that the question as to where the *dominium* of such property is vested is as far from solution as ever. It is proposed in the present article to set forth and to discuss the decisions of the Supreme Court upon the matter, together with some of the leading authorities in Roman-Dutch law, and if possible to evolve some principles upon which cases wherein this point is concerned may be dealt with. Of course, the terms of the different wills which have been under consideration, as well as the forms of action brought, have been very diverse, and the circumstances of each case, if narrowly scrutinised, may help us towards arriving at a common standpoint for those who hold views apparently so widely divergent.

As the discussion will turn somewhat upon the distinction between a usufructuary and a fiduciary, it will be as well to state generally that Voet (7, 1, 9, 10, 13) treats of the difference between the two, and lays down certain rules for the construction of a bequest, giving the consequences of the adoption of such rules. He there remarks that if usufruct is bequeathed with the burden of restoring to a third person after the legatee's death, whenever

there is a doubt, ownership with the burden of *fidei commissum* must be considered as bequeathed, rather than the bare usufruct; and Grotius (2, 20, 14) may be taken as to the same effect. Further, Sande (Dec. Fris., 5, 1, 2) says: "The words *for life* in a bequest do not always confer usufruct, but sometimes ownership; if the usufruct of an inheritance be bequeathed with this condition annexed that after his death the legatee should restore to another, ownership is considered as bequeathed;" and he refers to the case of a mutual will whereby the survivor was to have possession for life, and on his or her death, if without children, the property was to devolve upon the nearest relative then existing; on the death of the testator, who was the survivor, it was held that he did not have the usufruct, but full *dominium*. The rights of a fiduciary to deal with the property burdened are summarised shortly by Burge on Colonial Law (Book 2, pp. 121, *et seq.*), who refers to Voet (36, 1, 62, 63), Sande (3, 8, 8), and Gaill (lib. 2, obs. 137, n. 4, 10), amongst others, in support of what is there laid down. After referring to the Placaat of 1624, which required that all *fidei commissa* should be registered, (as to which see Voet 36, 1, 12, and also *in re Lutygens*, 2 Menz., 315, where it was decided that this is not in force within the Colony), he goes on to say that the burdened property cannot be alienated except when it is permitted by the author of the *fidei commissum*, the law, or the parties interested. If there be no other property of deceased available for payment of debts or legacies, the law authorises a sale. Property which would deteriorate by being kept may be sold with authority of the Court, but its price must be restored; property may be exchanged or mortgaged for the purpose of discharging some public tax; and a sale may take place with concurrence of all parties interested. The difficulty that will appear further on is, how to apply the rules laid down with regard to fiduciaries and usufructuaries to the survivor who has adiated under a mutual will, which has consolidated the estate. Upon this point Van der Keessel (Thes. 120) says: "The community of property which is continued by desire of the testator . . . resembles a *fidei commissum* of the residue in this respect that the portion to which the heirs of the deceased are entitled cannot be diminished *by donation or last will*;" and Van Leeuwen, *Commen.*

(3, 8, 10) says : "The free power of alienating and dealing with property as one's own in *fidei commissary* inheritance may not be extended further than to alienation *inter vivos* without thereby any disposal being allowed to be made by last will." But it is not quite clear whether Van Leeuwen would extend this to the case of property dealt with under mutual wills. As to the remedies competent for *fidei commissaries* they are shortly given by Grotius (Introd., 2, 23, 16) as follows : (1.) a right to demand from the heir a fulfilment of the bequest ; (2.) a real right to the thing bequeathed, if it belonged to the testator ; (3.) a right of tacit hypothec on all the testator's goods, *i.e.* after the debts have been paid ; but, he adds, right of mortgage may be disallowed by will. As to this right of tacit hypothec it is further limited to such property as came into the fiduciary's possession, and was not mixed up indiscriminately with his own ; *i.e.*, which can be traced as having belonged to the testator's estate ; for according to Holl. Cons. No. 266, if the property consist in money which cannot be distinguished from the fiduciary's property, the claim of the *fidei commissaries* is only concurrent. Many more authorities might be cited bearing on the same point, but it will be unnecessary for our present purpose to refer to more than these well-known writers, and these are only cited in order to clear the way for a discussion of the decided cases, and in order that we may consider how far such authorities are applicable to the case of the survivor under the mutual will where the property has been bequeathed in remainder.

The first case, apparently, in which the survivor's right to deal with such property was considered, was that of *Brits v. Brits* in 1842 (Buch. 1868, p. 312). By the mutual will the survivor was appointed sole heir of the predeceasing's property ; in respect of half of the estate the predeceasing nominated as heirs the children, the estate to be converted into money with the exception of a farm DK, which the survivor might take possession of for a fixed sum, under an obligation to make it devolve upon A, a son of the marriage, or his children should he predecease the survivor. The wife died ; the husband adiated under the will, but subsequently re-married, revoked the will as to DK, and by his second will directed it to be sold and the proceeds otherwise applied. He then died. A had predeceased him, but the grandson of the testators brought

this action against the executors under the second will to have it declared null and void as to DK, and that he might have possession thereof on his paying the fixed sum, and the Court gave judgment as prayed, thus holding that the survivor having adiated under the first will could not make a second contrary thereto.

Subsequently, in *Hofmeyr v. De Wet*, 1853 (Buch. 1868, p. 317), there was a mutual will which dealt with the whole joint estate, *the survivor being given the usufruct*, and after the survivor's death the common estate to go towards a fund for poor relations. The wife, who was the survivor, enjoyed the usufruct for 12 years. She subsequently made a second will in opposition to the joint will, and died. In an action against the executors it was held that she had adiated and therefore could not make a separate will in opposition to the joint will, and the said will was set aside. BELL, J., said: "The result of investigation appears to be that according to Grotius, Peckius, Van Leeuwen, and Van der Linden, if the spouses have reciprocally benefited each other by giving the survivor the usufruct of the estate for life, or any other benefit, and under this condition have, with the consent of each other, both dealt with the estate by their joint will, as if the whole belonged to each, the survivor, if he adiate the benefits, cannot revoke the joint will even as to his or her own share, *because by the death of the predeceasing the will has become a contract.*" The last words are important, as giving the reason for the rule adopted, and this would clearly point to the survivor not being able to encumber the property for his own purposes, or certainly not give it away. The *real* right, however, of legatees to follow up the property, as distinct from the *personal* right under contract, was not touched upon.

An interesting case may here be referred to, *McCarthy v. Newton & Zeederberg*, tried in 1861, and therefore coming now in historical sequence, which though it was not decided under a mutual will, yet touches on the power of a fiduciary and of an executor to encumber property registered in their name, and the rights of *bonâ fide* mortgagees consequent thereon. By will, Mrs. Mutery left one B her heir, with the entire use for his own benefit of her estate, and in case of his decease, whatever should remain should then be divided in equal shares to his and the testatrix's relatives; she

further left a legacy of £50 to one McCarthy, and appointed B her executor. She died in 1849, leaving immovable property registered in her name upon which was a mortgage bond for £200 passed by her in favour of Z. B acted under the will, filed an account wherein the landed property was brought up at £550, had this property transferred into his own name, and passed a fresh bond for £250 to Z, cancelling the old one. The legacy was not paid to McCarthy, nor was any money invested by B on its account; apparently it was not known where the legatee was; it afterwards appeared that he was a minor at Mrs. Mutery's death. In 1859 B died, having appointed N his heir and executor. N acted as such under the will of B, and had the landed property transferred into his own name, and passed a fresh bond of £350 in favour of Z in place of the old one, and subsequently two further bonds, one of £50 in favour of Z, and another of £60 in favour of M, all on the same property. M and Z appeared to have lent their money perfectly *bonâ fide*. McCarthy got himself appointed executor dative in Mrs. Mutery's estate and sued N, M, and Z for the amount of the legacy and for an order that the landed property should be handed over to him on behalf of the *fidei commissaries* under Mrs. Mutery's will, free of the mortgages. N alleged that at B's death, B owed him about £100. The Court held that B was by the will entitled to alienate three-fourths of the property, and that his debts, preferent as well as concurrent, due at his death, were to be regarded as alienations in computing how much of the said bequest B was to be taken as having alienated, and ordered that the property should be sold by N as B's executor; that the legacy of the £50 with interest and B's debts due at his death, not exceeding the value of the bequest, should be paid, and that out of the remaining balance, N's claim, if any, at B's death should be paid before any division among the further foreign heirs of Mrs. Mutery. This case shows that the opinion thrown out by the Court subsequently in *Lange v. Liesching*, hereafter referred to, in regard to *sale* by an heir or executor would not in all cases be applicable to *mortgages*, for the Court in this case, although recognising the bonds passed by B the *fiduciary*, apparently disregarded altogether the mortgages by N, who, although the registered owner, had really no interest in the estate.

In *Oosthuysen v. Oosthuysen* (Buch. 1868, p. 51) there was a mutual will massing the estate; the survivor was appointed sole heir, and two farms were bequeathed to two children on condition that the survivor should have the life-usufruct; the wife predeceased her husband; he adiated, remarried and transferred the farms to his second wife in trust for children of the second marriage. The children entitled under the first will brought action against their father, and succeeded in getting the transfer set aside, and plaintiffs were declared entitled to the farm. Here the Court went a step farther and restrained the survivor from alienating in his lifetime, and the case is important as showing that the Court probably held in this case that the *dominium* had vested in the children: it was, however, a donation that was set aside, and this would come under the prohibition mentioned by Van der Keessel, above referred to.

In 1870, *Quin v. Bartman* (Buch. 1870, p. 78) was heard. By mutual will, the husband bequeathed a life policy to his wife, and entailed the capital with *fidei commissum* under the condition that she should enjoy the interest thereof during her lifetime: after her decease the legacy was to become the property of the children; and the wife and children were appointed heirs of all the property; The husband died; the son became insolvent but was subsequently rehabilitated; the survivor then died. Under these circumstances the Court held that the son's trustee could claim the life policy for creditors, as it became vested in the children on the death of the predeceasing under the will. The only thing to be said in defence of this case, which has frequently been challenged, is that it was decided under the special terms of § 48 of the Insolvent Ordinance: it can hardly, however, be considered as a precedent, and doubt has more than once been cast upon it in high quarters. It seems to be in direct conflict with subsequent decisions, to be adverted to.

In *Upton v. Upton*, 1871 (Buch. 1879, p. 289) there was a mutual will whereby the survivor was appointed, together with the children, heir of all the estate of the predeceasing; one half of the said estate and a child's portion to belong to the survivor and the residue to the children in equal portions; the survivor to keep the whole of the joint estate under his administration and to enjoy the usufruct, and after his death the estate to be equally divided amongst the

children. The husband survived his wife, adiated, remarried and made a second will. In an action by the children against the executors under the second will, it was held that the joint estate and the proceeds and profits thereof were the property of plaintiffs, and the defendants were ordered to render an account of the joint estate as it stood at the death of the predeceasing. In this case, it must be remembered, no creditors were concerned; the case was one between parties to the will, and those claiming under a second will in contravention thereto.

In 1873 the case of *South African Association v. Mostert* (Buch. 1873, p. 31) was decided by the Privy Council, over-ruling the decision of the majority of the Supreme Court. In that case the survivor and the children of the marriage were appointed heirs, and the estate was burdened with *fidei commissum*, the interest to be enjoyed by the heirs and the capital by their descendants; there was a provision in the will that debts due from the heirs should not be exacted. The husband died, the widow at first appeared inclined to adopt the will, but subsequently renounced the benefits; the cessionary of a bond in the estate passed in testator's favour then sued defendant, married in community to one of the heirs, thereon. The Supreme Court gave judgment for defendant but the Privy Council on appeal reversed this decision and gave judgment for half the amount sued for, holding that the widow had not adiated, and that she could therefore revoke the will as to her half share. They laid down the following proposition, which, though not in its entirety necessary for the decision of the case, has been since then recognised as law in the Colony: "The mutual will of husband and wife is to be read as the separate will of each; and the dispositions of each spouse are to be treated as applicable to his or her half of the joint property; each is at liberty to revoke his or her part of the will during the testator's lifetime with or without communication with the co-testator, and after the co-testator's death; but when a spouse who first dies has bequeathed any benefit in favour of the survivor and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor if he or she accepts such benefits may not afterwards *dispose by will* of his or her share in any manner at variance with the will of the deceased spouse." It has sometimes been said that the

last clause limits the survivor's rights entirely as to any alienation, &c., of the property, but if carefully looked into, the argument and decision will be seen to have been confined to right of disposition by will ; though of course the remarks of BELL, J., in *Hofmeyr v. De Wet* (which case, as well as the case of *Oosthuysen*, the Privy Council cited with approval) as to the reason of the rule, go far to show that *all disposition* should be restrained.

The case of *Huddingh v. De Roubaix*, 1878 (3 Roscoe, p. 11) presented the side of the question from the creditor's point of view. By the joint will the survivor and children were appointed heirs of the first-dying, on condition that the survivor should be allowed to keep the whole of the joint estate under his or her sole direction and administration, and to remain in full and undisturbed possession and in enjoyment of the *usufruct* of the rents and profits, and on the further condition that *at the survivor's death the joint estate should be equally divided* among the children and the descendants of such as should die before the testators. The wife died ; the husband remained in possession of the joint estate and passed a bond on the property, which was registered in his name ; part, at all events, of the money he appropriated to his own use ; he became insolvent, and the bond-holder brought action against the guardian of the children (who were minors) and the trustee of the insolvent, to have his claim declared preferent to that of the minors. The Court held that the insolvent was a fiduciary heir ; that the tacit hypothec of the minors must be allowed against their mother's estate, but that they had no hypothec against the estate of their father, the fiduciary heir ; consequently they were allowed to prove preferently for the present value of half the amount of the joint estate, and concurrently for the present value of the other half. The Court held that the minors' claim was a contingent debt on the insolvent estate ; that there was *no vesting* of the estate in the children at the death of the first-dying, and that they were simply in the position of *fidei commissaries*.

In *Lange v. Scheepers* (Aug., 1878) the circumstances were as follows : By joint will, testators left a farm to their son on condition of his paying a sum of money into the estate after the survivor's decease ; and there was a prohibition of alienation *extra familiam*. The husband died, leaving a son and daughters ; and a few years

afterwards the survivor gave up all her interest in the farm and transferred it to the son. The son sold part of the property to defendant, a stranger, who knew of the *fidei commissum*, and the property was transferred. The other children brought action against defendant to have transfer set aside on the ground that the transferor had no authority. The Court gave judgment for plaintiffs, deducting the value of improvements made by defendant. This case hardly touches the point at issue, as two circumstances, the prohibition *extra familiam*, and the knowledge of defendant distinguish it from the other decisions and it is only referred to in order to contrast it with *Lange v. Liesching*, in which the remedies of *fidei commissaries* were discussed very fully.

The case of *In re Zipp* was heard in December, 1878. By joint will the survivor and the children were appointed heirs of the predeceasing, in all the testator's property, to be possessed by them as their full and free property, with the condition that the survivor remained bound to support the children till majority, marriage, &c., "at which time each shall be paid out such portion as the survivor shall think fit, the survivor to remain in full and undisturbed possession in order to be the better enabled by means of the *usufruct* to educate and support the minors: further, *after the survivor's death, two farms were bequeathed* to the children,—to be entered upon and possessed by them after the survivor's death as their free and own property. The husband died, leaving three children. The wife survived. Subsequently one of the children died and the survivor was appointed executrix dative. She then applied to the Court for an order that appraisers might be appointed to value the farms, and that she might be allowed to transfer them to the surviving children and to raise a mortgage on them to the extent of one third of the appraised value, such sum to be paid into the estate of the deceased child. It was argued on behalf of the minors that the estate did not vest in them till the survivor's death and consequently that the *jus accrescendi* obtained in respect of the deceased child's share, but the Court held that the petitioner was entitled to her share in the estate of the deceased child, as heir *ab intestato*, and was therefore entitled to an order mortgaging the property to pay herself the portion due to her, and directed that an appraisal should be made, deducting from it the value of her life interest.

DE VILLIERS, C. J., in giving judgment, is reported to have said : "The question is whether the right of this deceased child had vested at the time of his death. . . . In cases where the person upon whose death the remainderman is to take, himself receives a *life-interest*, an important question always arises whether it is a *fidei commissum* or whether the person having the life-interest is a mere usufructuary. When he obtains a mere usufruct it has been held that those who take the property after his death take a vested interest, but where it is *fidei commissum*, those who take after him do not take a vested interest and cannot transmit their legacy to their heirs. . . . What the testators intended to be done was to take everything from the survivor except the bare usufruct; there was not even a clause requiring the survivor to hand over the property upon his death to his children; the words *fidei commissum* are not used at all." The case is important as laying down a principle upon which to decide when the vesting takes place; and it is a strong case against the view that the *dominium* in such property must always remain in the survivor.

On similar lines was the decision in *Lucas v. Hoole* (Buch. 1879, p. 132). There the survivor with the children was appointed heir of the first-dying: *one half of the estate of first-dying and a child's portion to belong to the survivor and the residue to the children*; the survivor to be allowed to keep the whole of the joint estate under his administration and to enjoy the *usufruct* and at the demise of the survivor, the joint estate to be equally divided amongst the children. The husband survived, adiated, remarried and made a second will dealing with all the property. In an action brought by one of the children against the executor under the second will, it was held that as to a child's portion, and half the estate of the first-dying, the survivor was a fiduciary, and as to the rest of the estate a usufructuary; and that under the mutual will the children of the first marriage became entitled, after the survivor's death, to the *whole of the joint estate of the testator and his first wife*, as it stood at the time of her death. In this case, however, no creditors were concerned; and the case does not really take us very much further than *Mostert's* case.

In *Booyesen v. Colonial Orphan Chamber*, 1880 (Foord's Reports, p. 48), B and wife had made a mutual will whereby certain farms

were left to their children, who were to have *no claim to the property before the survivor's death*. The wife died; the farms were not then registered in the testator's names, but subsequently B obtained transfer and mortgaged to a *bonâ fide* mortgagee without knowledge of the will; the money was probably used by B for his own purposes. Judgment was obtained upon the bond and the property was declared executable. Action was brought on behalf of the children, who were minors, *against the mortgagee and the purchaser in execution*, to have the bond declared null and void, and to interdict the transfer. The Court held that it was unnecessary to decide whether there had been adiation or not, for the farms were not vested in the testatrix at her death; consequently the minors had no right *in rem*; further, that they had no hypothecary rights, as the goods and effects of deceased, and not of the fiduciary heir, were subject to the tacit hypothec of *fidei commissaries*. The action was therefore dismissed without prejudice to the minors' rights to recover from the estate of B (who had died before the action was decided) the full or half share of the legacy.

Shortly afterwards, *Lange v. Liesching* (Foord, p. 55) was decided. The will was the same as in *Lange v. Scheepers* referred to above; the son had mortgaged part of the property for his own purposes; he then became insolvent and the farm was sold by public auction; defendant had purchased it; the children were majors at the time of the sale and were aware of it; they did not prove in the insolvent estate, but now brought action to have the sale declared null and void. The Court held that the action could not succeed; the judicial sale in insolvency gave a good title against any one: the hypothecary action was barred by Act 5, 1861, § 9, and it was doubtful whether the *rei vindicatio* was not also barred thereby. DE VILLIERS, C. J., in giving judgment said: "Considering the large powers vested by our law in executors, the judicial nature of the act of transfer, and the facilities afforded to *fidei commissaries* to have their limited interests in land recorded in the Deeds Registry, I incline to the opinion that an *absolute transfer to a bonâ fide purchaser from executors, or their transferee, ought to debar any legatee or fidei commissary heir of deceased from thereafter claiming such property as his own.*" It appears that these remarks would apply almost equally well to *mortgages*, and if this be so, many of

the difficulties in the way of reconciling the decided cases disappear; for if in the one case the legatee is debarred from claiming the property as his own, in the other case he should be similarly debarred from claiming it without the encumbrance upon it, passed as it has been in a similar public manner in the Deeds Registry. His tacit hypothec upon the predeceasor's estate would protect him to the extent of one-half, but no further. These remarks of the Chief Justice seem eminently applicable to the cases decided very recently.

In *Rahl v. De Jager* (3 Juta, p. 38), under a joint will, whereby the survivor and children were appointed heirs, two farms were bequeathed after the death of the survivor to the children. It was held that the children's rights vested on the death of the predeceasor, and that the survivor was a mere usufructuary. Here again no creditors were concerned; the construction of the will at least was decided in a matter between parties to it. This case supports that of *In re Zipp*.

In *Ferreira v. Otto* (3 Juta, p. 193), the Court laid down the following rule: The transfer by an executor to a person other than the legatee, of land bequeathed by a testator may, under certain circumstances, be voidable, but it is not necessarily void. If the transfer was in pursuance of a sale by an executor for payment of the testator's debts, or for the purpose of carrying out such a family arrangement as the Court would have approved of, the bare fact that the transferee knew of the will will not render the transfer void; and even if the Court might not so have approved, the fact that the legatee, being *sui juris*, and knowing of the transfer, lay by for a long time without making objection thereto, would justify the Court, in the absence of fraud on the transferee's part, in refusing to set the transfer aside. Here the Court somewhat enlarged on the principles laid down in *Lange v. Liesching*, but in no sense departed therefrom.

In *Van Rooyen v. M'Coll* (3 Juta, p. 284), the mutual will appointed the survivor with the children heirs. After the death of the predeceasor, the three eldest sons were to take possession of a certain farm in the estate, until the death of the survivor, who was to remain in possession thereof after the death of the predeceasor, with the condition that the three sons should maintain the survivor

and the minor children out of the usufruct, and in case of the decease of both testators, the sons were to retain their control over the farm in order to maintain the minors until majority or marriage, after which the farm was to be sold and the proceeds divided among the children. The wife died; the husband adiated and passed a bond on the farm, which was registered in his name. The three sons were sureties to the bond. Some of the money thus obtained went to pay debts of the joint estate; there were no other funds available for payment of these debts. The mortgagee ceded the bond; the cessionary obtained judgment; the property was declared executable and attached. The children, some of whom were minors, brought action against the judgment creditor, the survivor and the sons, to *have the bond declared null and void*. The Court held that the bond was not null and void; that it could enquire whether the proceeds of the bond had been utilised for the benefit of the joint estate, and that in this case, portion, at all events, of the money had been so utilised. But the Court further expressed an opinion that the minors had a tacit hypothec against the share of the predeceasing, but not against that of the survivor, and that in the distribution of the proceeds of the sale, a certain proportion should be paid over to the minors to satisfy that hypothec. There was no decision as to the vesting of the property, and we have no note of the argument.

The next case was that of *Oosthuysen v. Moffat* (5 Juta, p. 319). By mutual will, O and his wife bequeathed to each other two farms, X and Y, to be by the survivor occupied free and undisturbed until his or her death, *and at the survivor's decease to be sold for the benefit of the children* "of this and any subsequent marriage." The wife died. O adiated, and then remarried and mortgaged the farms to M, using all the money for his own purposes. He was sued on the bond, and the property was sold in execution; but the proceeds were interdicted in the Sheriff's hands, by O's second wife, as tutrix of O's children by the second marriage. She now moved against M to show cause why the proceeds of the sale should not be first devoted to pay minors' shares. The Court ordered that one half of the proceeds should be paid over to the minors; holding that in the case of a mutual will, by which the survivor has been appointed fiduciary, the tacit hypothec of the *fidei commis-*

sary affects only the share of the first-dying testator (following *Booyesen v. Colonial Orphan Chamber* and *Van Rooyen v. M'Coll*), and only such property of the deceased as comes into the possession of the fiduciary, and can be distinguished and separated from that of the fiduciary (see *Holl. Cons.*, 266); and suggesting that this latter limitation may have been lost sight of in *Hull v. M'Master*, 1866 (1 *Roscoe*, p. 401). The Court treated the question solely as one of tacit hypothec, though the point as to the vesting of the property was argued. The Court probably considered that under the terms of the will the survivor was a fiduciary, and that the children consequently took no vested interest; thus distinguishing the terms of this will from that in *In re Zipp*, and assimilating it to that in *Hiddingh v. De Roubaix*; although in the case of *Nortje v. Nortje* (Feb., 1888), where the terms of the will were similar, the Court held that a vested interest was acquired. One could have wished, however, that the *real right*, Grotius' second remedy above referred to, had been touched upon by the Court. It seems that the principle applied in *Lange v. Liesching* to a case of sale would apply here.

In *Haupt v. Van der Heerer* (March 12, 1888), a mutual will of the following tenor was under consideration: "As heirs, the wife, who was the predeceasing, appointed (1.) her husband, (2.) her children. A farm was bequeathed by the testators to their children under condition that should the testator be the survivor he should retain the full right and possession of the said farm; but should the testatrix be the survivor, the children should be allowed possession within six months after the testator's death, on condition that she should be allowed during her lifetime to enjoy half the usufruct, i.e. the produce of the farm, and to live in the dwelling-house. The wife died, and the husband appears to have adiated under the will, and passed a bond upon the farms, which were registered in his name. He then married and made another will, and appointed his second wife executrix thereunder. There was nothing to show how the money obtained upon the mortgage was applied, or that the bondholder knew of the provisions of the joint will. The bondholder sued the executrix on the bond, and sought to have the property declared executable. The Court granted provisional sentence, and declared half the property

executable; no order as to the other half until notice to the legatees. But the Court threw out an opinion that the legatees were probably entitled to the half of the predeceasing; and this would be quite in accordance with the decision in *Oosthuysen v. Moffat*. The action did not proceed further. In this case it is to be noted that though it would seem at first sight that the survivor was a usufructuary, yet a marked difference is made in the will as to the rights which the testator and testatrix were to have in the property, according as one or the other survived. It is quite clear that the testatrix would have been a usufructuary, but not so clear that the testator was (see Sande above referred to). If the testator was a fiduciary, the case would differ rather in procedure than in principle from the one last referred to.

The last case it will be necessary to refer to is that of *Van Rooyen v. Gorman* (April 12, 1888), which is only useful on account of some remarks made by SMITH, Acting C.J., suggesting a way by legislation out of the difficulties that arise in cases of this nature. In that case, by the mutual will testators nominated each other and their children their heirs, and specifically *bequeathed their farm to their children, subject to the survivor's life-usufruct*. The wife died and the husband thereafter passed a bond on the farm, which stood registered in his name. The bondholder obtained judgment, and subsequently obtained a rule *nisi* calling upon the children to show cause why the property should not be declared executable. The Court (SMITH, Acting C. J., and BUCHANAN, J.) held that there was no proof of adiation, and granted execution against half the farm only. One cannot help regretting that the case went off upon this point, as here it was clearly a case of the legacy having vested in the children. Probably the decision of the Court would have been the same, and the case would not have been distinguished from the two previous. In giving judgment, SMITH, Acting C. J., is reported to have said: "The present state of the law is very unsatisfactory, because it frequently happens that a person about lending money on mortgage, went to the Deeds Office and found there was a clean transfer. Upon this the money was lent, and it was afterwards found that the property could not be legally mortgaged for the full amount. Under the old Placaat, all *fidei commissa* had to be registered, and it had been

suggested that this should be the law at present. This would be to the interest of mortgagees, but it was doubtful if it would benefit the minors. The subject is one which might very well be taken up by the Law Society. One way of dealing with the difficulty would be that whenever a will was filed with the Master, and there was a survivor who was to have a life-usufruct, notice should be sent to the Registrar of Deeds, who should make an endorsement upon the transfer."

So much for the cases on the title acquired by will; it will now be only necessary to refer to the leading case on title by registration, before adverting to the conflict between the two titles, and endeavouring to lay down some general principles, in cases where such conflict arises. The case of *Harris v. Buissinné* (2 Menz., p. 105) decided in 1840, has been confirmed by a long series of decisions and has passed into law, although the Court has intimated its unwillingness to extend the rule there enunciated beyond its necessary implication. It was there laid down that by the law of Holland, adopted into this Colony, the *dominium* of immovable property can only be conveyed by transfer *coram lege loci*, and the Court held that to sustain the claim of plaintiff (who had purchased from B immovable property registered in B's name, and had paid for it before B's insolvency, but had not obtained transfer) would be to overturn the whole law of Holland as to immovable property, and deprive creditors of the protection afforded them by the Deeds Registry. We must remark in respect of this case that it was decided in reference to the Insolvent Ordinance and the vesting in trustees thereunder, and was never intended to lay down the doctrine that registration was the sole evidence of title to immovable property; and in the cases of *Kimberley Divisional Council v. London and South African Exploration Co.* (3 A. C. p. 23), and *Kimberley Public Gardens Trustees v. Colonial Government* (5 Juta p. 316), the Chief Justice specially guarded against the establishment of such principle. We must also remark that although all wills by law have to be filed with the Master, yet the Courts have never regarded the filing of a will as giving notice to the world in the same way as the registration of immovable property is held to do.

To summarise the results obtained from a review of the above cases is difficult, but certain general rules may be regarded as established.

(1.) It is quite clear that the rule laid down in *Mostert's* case as to the incapacity of a survivor to *dispose by will* of either his or the predeceasing's share of the joint estate, after he has adiated under a will "massing" the estate, is law (see also *Brits v. Brits*; *Hofmeyr v. De Wet*); but these cases never laid down that there is no right to alienate or encumber; the authorities quoted refer to the survivor's power to revoke a prior will. (2.) In cases where the survivor is a *bare usufructuary*, the estate vests in the legatees on the death of the predeceasing (*Upton v. Upton*, *In re Zipp*, *Lucas v. Hoole*, *Rahl v. De Jager*); and they are entitled on such survivor's death, *as against his representatives*, to an account of the estate as it stood at the death of the predeceasing: and fidei commissaries would be entitled, it would seem, to an account of the value of the *fidei commissum* calculated at the death of the *fiduciarius*; further, such legatees can restrain the survivor during lifetime from alienating the property of the joint estate in contravention of the terms of the will, at all events if such alienation be by donation (*Oosthuysen v. Oosthuysen*, and *Van der Keessel*, *Thes.* 120). (3.) If a survivor who is *fiduciary heir* encumbers the property registered in his name, in favour of a *bonâ fide* mortgagee for value without notice of the will, the Court will not allow the fidei commissaries to recover more than half the proceeds if the property be sold in execution under judgment obtained by the mortgagee; and in case of insolvency of the fiduciary, will allow the fidei commissaries to prove preferently for the present value of half their claim, and concurrently for the rest; and this half in such cases they are awarded by virtue of their tacit hypothec upon the estate of the predeceasing, they having no such hypothec upon the estate of the fiduciary (*Hiddingh v. De Roubaix*, *Van Rooyen v. M'Coll*, *Oosthuysen v. Moffat*.) (4.) The result would probably be similar to that in (3) where the survivor was a *bare usufructuary*, the Court recognising the registered title in the survivor to the extent of declaring half the property executable for the mortgagee's claim, on the same principle as that laid down in *Lange v. Liesching*, and also in accordance with the reason of the rule in *Harris v. Buissinné* (*Haupt v. Van den Heever*.) (5.) If a sale by the survivor take place, followed by transfer to a *bonâ fide* purchaser, the fidei commissaries or legatees have simply their personal remedy against the heir or executor to recover the value of

their property, at all events if they were aware of what was going on and raised no objection to the interference with their rights (*Lange v. Liesching*) ; and probably it would be the same, if they were unaware of such sale at the time. (6.) A transfer by an heir or executor contrary to the provisions of a will is not necessarily void, though voidable ; and if made in pursuance of some family arrangement which the Court would have approved of, or manifestly for the benefit of the estate, or for payment of the testator's debts, will not be set aside ; and in any case, in order to impugn it, the action must be timeously brought (*Ferreira v. Otto*). (7.) A mortgage by a survivor, a fiduciary (or usufructuary), is not necessarily void ; the Court will always enquire as to the purposes to which the money obtained was devoted, and if it was used wholly or in part to pay debts of the joint estate will not set it aside, but will refuse the fidei commissaries (or legatees) redress to that extent (*Van Rooyen v. M'Coll*) ; at any rate if the *proceeds* of the property were bequeathed, and not the property itself. (8.) The tacit hypothec of fidei commissaries upon the estate of the fiduciary only extends to such goods as can be proved to have belonged to the estate of their testator and to have come into the fiduciary's possession, and they have only a concurrent claim on the estate if the property has been so mixed up with the fiduciary's as to make it impossible to distinguish it from the fiduciary's own goods (*In re Lutgens, Oosthuysen v. Moffat* ; but see *Hull v. M'Master*). The most serious difficulty in reconciling the decided cases, arises out of the question of the tacit hypothec of *minors* upon the estate of their *guardian* or *surviving parent* ; a point never fully discussed by the Court. (9.) As to the case of *Quin v. Bartman*, we must either regard it as decided specially under a particular section of the Insolvent Ordinance, or better still, consider that it would not now be followed. (10.) In construction of such wills, in cases of doubt, the leaning should be towards construing the survivor a fiduciary rather than a usufructuary, so as to prevent the vesting during the survivor's lifetime (*Voet, Sande, Grotius*). (11.) In cases where the property is not vested in the testators at the time of the death of the predeceasing, the only remedy for fidei commissaries is the hypothecary one, or a personal claim against the

estate of the heir (*Booyesen v. Colonial Orphan Chamber*). (12.) Where the transferee knows of the *fidei commissum*, the transfer made in contravention thereof may be set aside (*Lange v. Scheepers*).

In the above we have been treating mainly of immovable property; as to movables, the maxim *mobilia non habent sequelam* prevents the same complications arising. In cases where the movable property is vested in trustees, the survivor drawing the interest, the same difficulty cannot arise; and in cases where the movables are left unfettered in the survivor's hands, though on the principles laid down (see 2) he can be restrained from alienating; once alienated, the property cannot be recovered, unless of course in case of fraud. Where the survivor is a bare usufructuary, it would seem to be an advisable course for the immovable property to be at once registered in the name of the legatees, subject of course to the usufruct; and it is difficult to see how, in the face of the decision *In re Zipp*, such a course could be objected to, if steps were taken by the legatees, or by their guardian should they be minors. At all events, the survivor might be compelled to give security, and there are authorities for such a course (see *Neostadius* and others). Whether the fiduciary can be compelled to give security under similar circumstances may not be so clear; but if he is executor under the will, he can be compelled to take transfer *qua* executor. Our space will not enable further discussion on this head. That some alteration in the law is necessary must be patent to all, for the Court has gone as far as it possibly can to protect the rights of *bonâ fide* mortgagees; but it cannot go farther than to make half of their security available for the payment of their debt. Some system of registration of *fidei commissa*, or of endorsement upon the transfer-deed of the trusts upon which property absolutely registered in the name of an individual is held, is necessary in order to complete what is in most respects an admirable system of registration in use within this Colony.

M. S.

NOTES ON SOME CONTROVERTED POINTS OF LAW.

IV.—THE PACTUM DOMINII RESERVATI.

Is an agreement attached to a contract of Purchase and Sale to the effect that the property in the thing sold shall not pass at once to the purchaser, though the contract is otherwise perfected, valid?

ANSWERED AFFIRMATIVELY—*Dictum* in *Daniels v. Cooper*, 1 Buch. E.D.C., 181.

ANSWERED NEGATIVELY—*Dictum* in *Quirk's Trustees v. Assignees of Liddle*, 3 Juta, 326.

When a sale for credit has been effected and delivery has taken place, the purchaser thereby becomes owner of the thing sold. But an agreement may be attached to the sale that the property shall not pass unless, and until, the purchase price has been paid in full. Such an agreement is known as a *pactum dominii reservati* (Bort, Nagelatene Werken, 2, 7, 4; Brunneman's Consilia, 157; Mühlenbrach, Doctrina Pandectarum, 2, § 405; Glück xvi., § 1000, p. 229). Vangerow says that this agreement is a very common one in modern times; and that it can be made under either a suspensive or a resolute condition (Lehrbuch der Pandecten, 1, § 311, p. 568). Such an agreement is not in conflict with the passage from the Digest (18, 1, 80, § 3) which has been cited to shew that it is forbidden by law. All that is said there is (what in itself seems pretty obvious) that where an agreement is attached to a contract that at no future time whatsoever the property should pass to the party acquiring possession of the thing, such a contract cannot be considered as a sale, but must be regarded as some other form of contract. And indeed in some cases the agreement of reserved ownership would coincide with the *Lex Commissoria*, a well known and perfectly valid agreement. The *dictum* in *Quirk's Trustees v. Assignees of Liddle* can therefore hardly be upheld.

V.—DAMAGES UNDER THE LEX AQUILIA.

Is a plaintiff, who has proved the infringement of a right, but who fails to prove specific and appreciable damage, ipso facto, entitled to damages?

ANSWERED AFFIRMATIVELY—*Jansen v. Pienaar*, 1 Juta, 276.

ANSWERED NEGATIVELY—*Visser v. London and Jagersfontein Diamond Mining Company*, 1 Cape Law Journal, 341

The Roman Law carefully and very properly distinguished between loss inflicted on one's pocket and damage done to one's character, through the slanderous words, or insulting language or actions of another. The person aggrieved in respect of his pocket or of his character was entitled to redress; but the means of redress were perfectly distinct in the one case and in the other. One's character could be vindicated by an action of injury (*actio injuriarum*); compensation for pecuniary loss occasioned by the fault of another, independently of any contract, could be sought for in an action for damages (*damnum injuria datum*). It may be remarked that the word *injuria*, in the expression *damnum injuria datum*, is equivalent merely to *culpa*, and is used therefore in a sense very different from that in which it is used in the expression *actio injuriarum* (Voet, 9, 2, 3, and 47, 10, 1). Now it might, of course, happen that one and the same act of a wrongdoer would affect both the character and the pocket of another. In such a case the person aggrieved may sue either for the damages he has actually sustained, or for the sum at which he will, under his oath, estimate the injury; or he may sue for both, in one and the same action (Voet, 44, 7, 16). If, however, he elects to institute an action only for pecuniary loss actually inflicted, and does not prove such loss, he must be non-suited. In this matter the Roman law is more logical than the English law, which does not make this careful distinction between property and character; indeed property, according to the law of England, would seem to be of greater consequence than character. Hence the monstrous and iniquitous decisions of English law-courts, that when a young woman, however virtuous or high-placed she may be, has been falsely and maliciously charged with unchastity, she has no legal redress against her slanderer, unless she can prove that she has suffered pecuniary loss as the result of the imputation against her. The only exception to this is in the case of actions brought in the local Courts of the city of London, of the borough of Southwark, and of the city of Bristol, where special damage need not be proved! A person may tell of you that you are a scoundrel, and have defrauded

your own brother of so many thousands of pounds, but you have no legal remedy unless you can prove your damage in pounds, shillings and pence. On the other hand, when there has been an invasion of your rights of property, the wrongdoer is liable to damages in an action of trespass, though it may not be proved that you suffered loss to the extent of a single farthing. In America (where the common law of England has been introduced), the difficulty caused by the absence of special damage was surmounted by suing in trespass:—When a man who, instead of walking along the street, stopped on the pavement opposite the plaintiff's freehold, using insulting and abusive language toward the plaintiff, and persisted in such conduct, though requested to move on, it was held that he was a trespasser, and that the jury in an action of trespass could award substantial damages, though no special damage was proved. For as one of the public he was only entitled to use the highway for passing and re-passing. And evidence of his language, while committing a trespass, is properly admitted to shew in what spirit the act was done. When a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration and giving retributory damages (Odgers on Libel, pp. 83, 84). Apparently, then, the result in this case was determined by the fortuitous circumstance that the defendant stood in the highway when insulting and abusing the plaintiff; and had defendant remained on his own property whilst doing so, plaintiff would have had no ground of action against him. How far removed all this is from the simplicity and common sense of the Roman law.

M.

FIRE INSURANCE ON BEQUESTS.

In our last April number the case of *Miller v. Miller's Executors*⁽¹⁾ was noticed in the Digest of Cases decided in the Supreme Court. The circumstances of the case were very peculiar and remarkable. The late Mr. Miller specifically bequeathed his residence and landed property situated at Rosebank, near Capetown, with all the furniture and effects therein and thereon, to his

⁽¹⁾ Ante, Part II, p. 98.

daughter, the plaintiff. One night the house was discovered to be on fire, and during the progress of the fire the testator died from the effects of the shock. At the moment of his death the premises were not wholly destroyed, but it was admitted that there was no possibility of saving them. The house and furniture had been insured in his lifetime by the testator, and after his death the insurance company paid over to his executors the amount of the policy. The executors were in a difficulty how to distribute this money, whether the legatee of the property was entitled thereto, or whether it formed part of the residue of the testator's estate. As minors were interested, a special case was submitted to the Court. It was found impossible accurately to fix the precise period of the testator's death, or to what extent the property was destroyed at that time. As a compromise it was proposed to divide the insurance money between the legatee and the residuary heirs, and this compromise was ratified by the Court on behalf of the minors.

The case occasioned considerable interest among the profession, and several legal questions were raised upon which, in consequence of the compromise, no decision was pronounced. One important issue was, What system of law should be applied? The General Law Amendment Act of 1879, § 2, enacts that in every suit having reference to questions of fire insurance the law administered by the High Court of Justice in England shall be the law to be administered in this Colony, except in so far as the same shall be repugnant to any local Statute. The language of the Legislature, however, is not to be accepted without reservation, for the Chief Justice, in *Davies v. The South British Insurance Co.*,⁽²⁾ remarked:—"I cannot concur in the view that the Act was intended to apply to every legal question that may incidentally arise in the course of an action upon a policy of insurance." Though, no doubt, from one point of view, this was not a question of fire insurance, but rather of administration of an estate of a testator, still there seems force in the contention that the disposition of the money paid upon a policy of insurance must depend on the nature of the contract from which it is derived, and that in determining the nature of that contract the rules of English law must be adopted.

⁽²⁾ 3 Juta, 422.

Here there was a bequest both of landed property and of movables. By either system of law, if chattels which are bequeathed perish during the lifetime of the testator, the bequest would entirely fail, or it is termed, be adeemed. And in England it was held, in *Durrant v. Friend*,⁽³⁾ that where the testator and the chattels perished together, the legatee was not entitled to the insurance money. From the inherent difference in the nature of landed property and of movables, it would be difficult to apply this decision to its full extent as to immovables. Where goods are wholly destroyed, the reason the bequest fails is, for want of a thing in existence upon which to operate. But in case of the bequest of a house, the land remains, though the value of the legacy may have been diminished by the destruction of the building. Where there is something in existence to 'pass, from the moment of the death of the testator the legatee acquires a vested interest. If a house which had been bequeathed was destroyed during the lifetime of the testator, and therefore before any vesting could take place, and the insurance money was paid over to the testator, he could please himself whether or not he re-instated the house. But if his death occurred after the fire, yet before the payment of the insurance money, and the insurance office after the testator's death elected to exercise the right of re-instatement, would not the house so re-instated go with the bequest of the land? By the English Statute 14, Geo. IV., c. 78, a right seems to be given to a legatee, if he can intercept the insurance money, to require it to be applied to re-instatement.

By English common law it would appear doubtful whether any person but the person who actually contracts with the insurance company could enforce the contract. Probably for their own credit, insurance companies would not rely on such a defence to any claim made by the contractor's representatives. In the comparatively recent case of *Raynor v. Preston*,⁽⁴⁾ it was laid down by Lords Justices COTTON and BRETT, confirming the judgment of the Master of the Rolls, and contrary to the opinion of Lord Justice JAMES, that a fire insurance policy does not run with the land. In that case, and in the other decisions upon which that case was based, the question was between the vendor and the pur-

(3) 5 De G. & Sm., 343.

(4) 18 Ch. Div., 1.

chaser of real property. The vendor had insured property, which was destroyed after the agreement of sale but before the completion of the contract. He had afterwards also received the purchase price from the buyer, and it was held that as the contract of insurance was a personal one, the benefit thereof could not be claimed by the purchaser; though the majority of the Court also intimated that as the vendor had not suffered any damage he could not keep the money as against the insurance company. The same rule has been applied where movables which had been insured had been sold and subsequently destroyed.

Some systems of jurisprudence founded on the Civil Law would seem to differ from the rules of English law. According to Porter on Insurance,⁽⁵⁾ by the old French law still in force in Canada it would be held that the policy was an accessory to and would pass with the land. This also seems to be the view of Pardessus.⁽⁶⁾ In this Colony it might be contended that it would not be correct to say that insurance money is in every case a necessary accessory to landed property. Take for instance the case of a mortgage. If a house on property bonded was insured by the debtor, and the policy not ceded to the mortgagee, if such house was destroyed by fire, and the insurer restored the house, the mortgagee would practically get the benefit of the insurance; but if the insurance money was to be paid over, it would probably form part of the debtor's estate, which would not be subject to the special hypothecation, though perhaps it might be covered by the general clause if there were no previous bonds. Of course a mortgagee's position is very materially different from that which would be occupied by a legatee, as the mortgagee with us has not the dominion or any vested interest in the property itself.

It seems probable that in English law a distinction is drawn between a purchaser of property, and a legatee who has taken a vested interest. In one of the latest of text books, Porter on the Law of Insurance, published in 1884, it is stated:⁽⁷⁾ "If legatees or devisees have a vested interest under a will, or widow, or heir-at-law or next of kin under an intestacy, in real or personal estate which has been insured, it would seem, though it has not been expressly decided, that the proceeds of any policy thereon in case

⁽⁵⁾ p. 290.

⁽⁶⁾ Articles 594, 825, &c.

⁽⁷⁾ p. 292.

of a fire after the testator's or intestate's death, will be held by the executor or administrator for the benefit of the person or persons beneficially entitled. The money clearly represents the goods or land, and if payable at all, should be payable to the beneficial owner at the time of the fire." This view will be found supported by the cases of *Parry v. Ashley*,⁽⁸⁾ and *Regina v. Preston*.⁽⁹⁾ The leading principle throughout seems to be, that the Courts should give due effect to the wishes of the testator.

THE BARALONG MARRIAGE.

The case of *in re Bethell*, a report of which is to be found in a recent number of the Law Reports (38 Ch. D., 220), suggests some reflections on the legal aspect of marriage, which may prove of interest to the readers of the *Cape Law Journal*.

The salient facts of that case were, shortly stated, as follows: Christopher Bethell, a domiciled Englishman, took up his residence at Mafeking, in Bechuanaland, and there married a native girl named Teepoo, a member of the Baralong tribe. The form of marriage gone through was that which obtained among the Baralongs, which simply consisted in the bridegroom killing a sheep, buck, ox, or cow, sending the hide and head to the bride's parents, and then taking the bride to live with him. The marriage was then, provided the bride's parents' consent had been previously obtained, considered to be complete. According to Baralong custom a man may have more than one wife at one and the same time, but the first married is considered the principal. There was at this time a Wesleyan Church and Minister at Mafeking, but Bethell distinctly refused to be married in church, and expressly stated to the chief of the tribe that he was a Baralong, and wished to be married according to Baralong custom. Bethell, in letters to his friends and relatives in England, never mentioned his marriage or spoke of Teepoo as his wife, but he did allude to her as "that girl of mine." The marriage between Christopher Bethell and Teepoo according to Baralong custom took place in October, 1883,

⁽⁸⁾ 3 Sim., 97.

⁽⁹⁾ 18 Ch. Div., p. 5.

and they lived together as man and wife until the breaking out of hostilities in Bechuanaland, when Bethell joined the Bechuana mounted police. Bethell did not take any other woman than Teepoo as his wife. He was killed in an engagement with the Boers on the 30th July, 1884, and on the 9th August following Teepoo gave birth to a female child, of which Bethell was the father.

During his lifetime Christopher Bethell was entitled, under his father's will, to the revenue of certain estates in England, and at his death the estates were—so the will provided—either to be sold for the benefit of his child or children, or in case he left no children they were to pass to his elder brother.

The question for the English Court's decision was, who is entitled to the estates or their proceeds? or in other words, was Teepoo's child the legitimate child of Christopher Bethell? The answer to these questions obviously depended on whether the marriage at Mafeking was of such a kind as an English Court of law ought to recognise as valid.

Mr. Justice STIRLING, before whom the case was heard, came to the conclusion that the ceremony at Mafeking did not constitute a marriage according to English ideas, and therefore was not such a one as an English Court could give legal effect to.

Bethell's case decided no new point of law, it merely followed a decision of Lord PENZANCE pronounced in 1866 in *Hyde v. Hyde* (L. R., 1 P. and D., 130). This latter case decided against the validity of a Mormon marriage, on the ground that a plurality of wives was permitted by Mormon laws and customs.

But although Bethell's case set no vexed legal question at rest, yet in its course it was the means of raising, in arguments of counsel, a variety of interesting legal points which, although not calling for a decision at the time, yet can scarcely fail to prove of speculative interest to students of law.

At first sight Bethell's case appears to conflict with the clearly established rule of law that a marriage celebrated abroad, according to the *lex loci* is valid everywhere; or as Lord WENSLEYDALE expressed it, "it is the established principle that every marriage is to be universally recognised, which is valid according to the law of the place where it was had, whatever that law may be." (*Brook*

v. *Brook*, 9 H. L. C., 193, 241). But in reality there is no conflict whatever.

The seeming divergence is due to the ambiguity of the term "Marriage." What is considered marriage in one part of the world is not necessarily considered marriage in another part. Directly it is made clear that the term marriage is used in the rule to denote unions such as are recognised as marriages throughout Christendom, and no others, then the complete recognition of the rule in the cases of *Hyde v. Hyde* and *in re Bethell*, is manifest.

But what then is a marriage according to the Christian sense? Lord PENZANCE answers this well when he says in *Hyde v. Hyde* (1 P. and D., 133), "I conceive that marriage as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others. Very much the same idea finds expression in the marriage service as contained in the Book of Common Prayer, "Wilt thou. . . forsaking all others, keep thee only unto her so long as ye both shall live." With the facts before him, Mr. Justice STIRLING could come to no other conclusion than that Christopher Bethell did not intend, when he complied with the Baralong form of marriage, to unite himself for life "to one woman to the exclusion of all others."

The Supreme Court of this Colony in 1860, in the case of *Bronn v. Frits Bronn's Executors* (3 Searle, 313), decided almost the same point of law which arose in *Hyde v. Hyde* and *in re Bethell*, in precisely the same way. In the Colonial case the decision hinged on the legitimacy of the offspring of parents who had contracted a Mohammedan marriage. It was proved that by Mohammedan laws and customs men were not limited to one wife, and the Court (or at all events Justices BELL and WATERMEYER; the Chief Justice's, Sir W. HODGES, decision proceeded on another ground, and for Mr. Justice CLOETE's judgment no reasons are reported) concluded that a marriage of this kind could not be said "to be the voluntary union for life of one man and one woman, to the exclusion of all others," or as Mr. Justice WATERMEYER puts it, "the union and cohabitation of one man with one woman, to endure till the death of the first dying."

A Canadian case, *Connelly v. Woolrich*, was quoted by the counsel for the infant in Bethell's case, which does not appear to

clearly admit the validity of the principle on which the decisions in *Hyde v. Hyde* and *Bronn v. Frits Bronn's Executors*, rest. Unfortunately a report of this case is not available for consultation where this is written. Reference was thus made to it by counsel in argument: "Connolly, a Christian, who never lost his domicile of birth in Lower Canada, went to and did reside in the North-West Territories for 30 years, and there married an Indian woman of the Cree Indians, who were pagans, and the Court held that the marriage was valid notwithstanding the assumed existence of polygamy, and divorce at will obtained."

The counsel on the other side commented as follows on this case: "The case of *Connolly v. Woolrich* is of no authority in this country. It was decided upon the old French and Canon Laws. The 'necessity' there was shown to be absolute as there was no Minister nearer than 3,000 miles away." In other words, the fact that Connolly had married a woman of a tribe that recognised polygamy and divorce at will, did not of *itself* conclusively show that he intended to enter into a union of the nature understood and observed by that tribe. And the fact that he could not avail himself of Christian forms of marriage is a circumstance to be strongly taken into account in considering what sort of a union was intended.

Mr. Justice STIRLING, in referring to this case and also to an American decision, said: "Those decisions are not, of course, binding upon me, but they are entitled to most respectful consideration, and in the absence of direct English authority, might have exercised a weighty influence on my decision. The former of those cases was decided in 1860, before *Hyde v. Hyde*, and in the latter, judgment was given on the 9th of July, 1867, but *Hyde v. Hyde*, which was decided on the 20th March, 1867, was not referred to. I am not sure that the learned Judges who decided those cases took the same view of the law as is expressed by Lord PENZANCE, by which I consider myself to be bound; but in both cases the facts were very different from those in the present case, and circumstances were proved which might, in my judgment, well lead to the conclusion, consistently with the doctrine laid down in *Hyde v. Hyde*, that the marriages there under consideration were valid according to the law of England."

We are now lead to consider whether under any circumstances a marriage entered into with a woman of a tribe which admitted polygamy and divorce at will, in accordance with the customs and usages of that tribe, could be recognised as valid by the laws of England and of this Colony.

If this question is to be answered in the negative, it will, to say the least of it, be a matter of very great and almost universal regret. On ethical grounds the refusal to recognise a marriage of this nature under any circumstances whatever would be deplorable, indeed we are inclined to add, indefensible. For it is quite conceivable that a man, hundreds of miles away from the haunts of civilisation, might take unto himself for wife one of the daughters of a barbarous tribe which sanctions polygamy, with the fullest possible intention of cleaving only unto her until death should them part, and yet only going through the forms and ceremonies of marriage which are prescribed by the usages of the tribe, simply because he had no possible means of furnishing in the usual way the evidence of a Christian marriage, which the presence of formal documents, duly appointed officials, ministers of the Gospel, churches and the like, generally provide.

To refuse legal recognition to such a marriage, and to brand the offspring of it with the stigma of illegitimacy, would surely be revolting to one's moral sense. But apart from any question of ethics, it seems that on purely legal grounds—both on principle and on authority—the Courts of England and of this Colony would recognise the validity of such a marriage. But it must be admitted that the difficulty of satisfying the Court that a marriage in the Christian sense was contracted would be very great.

We are not aware of any English or Colonial case upholding the validity of a marriage entered into under such circumstances as we have indicated. However, if intention is the test, as we maintain it is, of the validity of a marriage performed in a barbarian country, with barbarian ceremonies, then there is no reason why an Englishman should not be able to contract a valid marriage with a Baralong or any other savage, even though the only marriage ceremonies were barbarian, and the tribe to which the bride belonged sanctioned polygamy and divorce at will.

LORD BROUGHAM's remarks in the oft-quoted case of *Warrender v. Warrender* (2 Cl. & F., 488), are ample warrant for this statement. There he said, "For the question always must be, Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably or sensibly, or safely, be considered otherwise than as intending a marriage contract."

The remarks of Mr. Justice STIRLING, which we quoted above, clearly show that, in his opinion, a marriage such as we have indicated could be held valid by English Courts of law. And Judges of this Colony have indicated a like opinion. In the case of *Bronn v. Frits Bronn's Executors*, already quoted, Mr. Justice BELL said, "If I had seen in this case any agreement of writing between the parties, to devote themselves to each other as man and wife, I should, notwithstanding the Proclamation of 1806, have been inclined to regard it as a legal marriage, notwithstanding that it had been celebrated according to the Mohammedan faith." Of course there is no peculiar virtue in writing, and Mr. Justice BELL referred to writing merely, no doubt, as furnishing the best evidence of intention at the time.

And in the same case Mr. Justice WATERMEYER remarked, "According to legal principle, the consent which is the proof of marriage, may be testified equally *in facie ecclesiæ*, or before a civil magistrate, or before witnesses, or in such other manner as the laws of a particular State may require—but there is marriage, provided the consent be clearly testified, and the contract be what I have described as marriage in law; the "*conjunctio hominis atque femine, individuum vite consortium continens*," the union of a man and woman involving the living together for life, for better for worse, as husband and wife."

Otherwise, as we have already tried to point out, a very gross injustice might be done to many estimable people and their direct descendants. Indeed, so clearly was this recognised by those responsible for the government of this country as early as 1848, that in that year the High Commissioner for adjusting the affairs of certain territories adjacent to this Colony, issued a Proclamation, for the purpose of placing the legality of marriages celebrated beyond the Orange River beyond all doubt. The

following extract from the Proclamation places its object in a clear light: "And whereas at various times during the period for which Her Majesty's emigrant subjects have occupied parts or portions of the said territories, many marriages have taken place amongst them which, owing to the impossibility of obtaining the presence or aid of any minister of the gospel and of conforming to divers requirements of law, have not as it is supposed been solemnized in such a manner as to render the same valid and effectual; and whereas the said marriages were so irregularly contracted by reason solely of the necessity under which the parties lay while deprived alike of religious teachers and of regular and established laws, and arose from no want of due reverence of the holy ordinance in question or for the spiritual sanctions with which amongst Christians it is customarily and fitly solemnized: and whereas taking these things into my consideration, and being desirous to confer upon Her Majesty's said subjects the important advantage of having their childrens' legitimacy established and their said marriages legalised for all purposes of law, I have determined to exercise for that end the powers and authorities in me vested."

And again, section 3, "Every couple (except as hereinafter excepted) united together within the said territories as man and wife in the presence of witnesses by any form of words expressive of their mutual and solemn consent to become and be then and there and from thenceforth married people, married together, may have their said marriage registered."

By Ordinance 4 of 1848 the marriages legalised in the Proclamation were recognised as legal in this Colony.

Similarly by Act 13 of 1857 the legality of certain marriages entered into by men belonging to the British German Legion and about which it was thought some question might arise owing to the unavoidable omission of certain forms and ceremonies in their solemnization, was placed beyond all doubt.

In our opinion, in neither of these cases was any legal exception made, but what was the law was declared in authoritative and unequivocal terms to be the law. And because of this authoritativeness in every way admirable and of substantial advantage, preventing even the possibility of raising questions which might

seriously prejudice legal rights, and undoubtedly give pain and annoyance to many worthy people.

But it must be observed that the marriages which the Proclamation and the Act of Parliament dealt with were only those in a Christian sense, "the union for life of one man and one woman to the exclusion of all others." Marriages such as Christopher Bethell's the common law of civilised countries has, we think, never recognised, and it is not the least likely that legislative enactments will attempt an innovation which morality and sound reason reject.

CRIM. CON.

The law on this action has yet to be settled in the Courts of this Colony. That this is the fact appears from a case reported in 5 Juta, 108, *Nanto v. Malgass*. In that case the Chief Justice is reported as follows: "I am by no means satisfied that, under our law, a husband can maintain an action for damages against an adulterer with his wife without suing her for a divorce. If such actions were allowed husbands might, in collusion with their wives, reap a high reward from the continued unchastity of their wives." The case cited was before the Supreme Court on appeal from a Magistrate's Court, and it was held on the appeal that our law does not recognise the validity of so-called marriage according to native customs, and that therefore a native taking a second wife could not be prosecuted for bigamy, and it was held that a native married according to Kafir custom was not entitled to recover damages in an action for *crim. con.*

But the question whether an action for *crim. con.* must also comprise a claim for divorce was before the Supreme Court some few years ago (in December, 1881). The case has not been reported otherwise than in a newspaper report; it is the case of *Hanson v. Ringham*. The defendant was sued for £500 damages for criminal connection with the plaintiff's wife, whereby the plaintiff was "deprived of the comfort, fellowship, society, aid, and assistance" of his wife.

There was no claim for divorce, the action was limited to a claim for damages only on account of the criminal connection.

The Chief Justice then accepted Grotius as the authority for bringing the action of *crim. con.* without any claim for divorce. Indeed, his lordship seems to have treated such an action in such a form as the existing practice of the Court. The point had been raised by Mr. Upington on behalf of the defendant, who adduced in support a *dictum* of Mr. Justice WATERMEYER opposed to an action of *crim. con.* claiming damages alone. This *dictum* of Mr. Justice WATERMEYER appears, from the judgment of the Chief Justice, in which Mr. Justice DWYER concurred, to have been the only authority in support of the contention, which in 1881 the Court declined to allow because, first, many cases of the kind had been brought in the Supreme Court, and secondly, because the authority of Grotius, presumably Chap. 35, sec. 9, was "quite clear."

Here then is something like a dilemma which can hardly be avoided, in the face of these two decisions. In the case reported in 5 Juta, the Chief Justice says, "I am by no means satisfied that, under our law a husband can maintain an action for damages against an adulterer with his wife without suing her for a divorce." The reason given by his lordship is one which seems to commend itself to the policy of the law, viz.:—That if such actions were allowed husbands might, in collusion with their wives, reap a high reward from the continued unchastity of their wives. But the authority of Grotius, with accompanying references to the Digest and Code, stands:—"A person who commits adultery with a married woman, even though with her consent, inflicts an injury on the husband, and is consequently liable for the same to the husband, over and above any damage which the husband or children may suffer thereby."

Whenever the question of the right to sue for damages sustained by the criminal connection of a wife may arise we shall not be surprised if the authority which was abundantly recognised in *Hanson v. Ringham* is allowed to hold good in support of actions for damages without an accompanying claim for divorce. That husbands would be likely to succeed in obtaining more than nominal damages in a second action arising out of criminal connection with the same wife may be doubted. Nor does the argument that a man has no moral right to sue for damages, without at the same time suing for a divorce, appear to be unanswerable. Over and

over again an innocent husband or wife is known to purposely abstain from availing himself or herself of the legal remedy which may be available, because the divorce which might readily be obtained would be an event desired by the guilty parties. For the same reason it is conceivable that a husband might wish to punish the adulterer who may have deprived him of his wife's affections, but without at the same time playing into the adulterer's hands by effecting a divorce. Adulterers do not as a rule command the sympathies of society, while it is greatly to the interests of society that such persons should be punished whenever it may be possible to punish them. The infliction of heavy damages is practically the only punishment countenanced in these days, although various penalties enumerated in Van der Linden (pp. 90 and 354) are, doubtless, of full force, and it seems hard to say that a plaintiff may not proceed at law in order to punish the seducer of his wife without being compelled to take a further step which shall deprive him of all legal control over his wife, a control which, if once abolished by the decree of divorce, is often transferred to the adulterer, however illegal such a course may be.

THE BALLOT.

The Bill to which attention was directed in our last issue enjoyed a very chequered career, and then passed into oblivion, and the subject, which was brought prominently before the public only by reason of the action of Government in attempting to legislate upon it, has probably ceased to be a matter of concern either in or out of Parliament. That the Bill should have been thrown out once on a motion that the Chairman leave the Chair, again on a motion for "the previous question," and that in answer to a member's inquiry for a third introduction, the Treasurer-General should have presumed to treat it as practically a private Bill, all this affords matter for somewhat serious reflection. It may well be questioned how far the study of constitutional law may be congenial to politicians as a body. But how a Bill of the importance of one which is directed to affect the system of voting either in large towns or throughout the country,

should be for one moment described as a private Bill, or as any other than a formal Government measure, it is difficult to comprehend. The Treasurer-General has on a former occasion advanced the proposition, which did not pass altogether unchallenged in some directions, that a Ministry might be regarded merely as the mouth-piece or agent of the Parliament, whose expressed wish it was bound to carry out, and might carry out notwithstanding the Ministry opposed the view of the majority on a given question. Upon constitutional grounds, it is right that dissent from these doctrines should be recorded. It has been well laid down by Mr. E. A. Freeman that no Minister, under our system of Parliamentary Government, remains in office after the rejection of a Government motion which he deems of any importance, although he may dissolve Parliament and appeal to the country; being, however, driven to resignation if the vote of the country prove hostile. The same high authority further points out that no Minister receives instruction from the House as to the policy which he is to carry out; least of all when he rises in his place in Parliament to advocate one policy, is he bidden by the House to go to his office and take the requisite administrative steps for carrying out another policy. It is just as well that countries, whether they are called Colonies or anything else, which profess to be governed upon the Parliamentary system, should, in accepting Parliamentary Government, accept also those principles which, although unwritten, have elsewhere become part and parcel of Parliamentary practice. In the matter of the late Ballot Bill, it was ultimately suggested by the Minister that the measure was in the nature of a private Bill, because it was introduced at the instance of some private members. But surely the origin of a Minister's wish to propose any given Government measure, is powerless to affect the real nature of that measure, and the responsibilities or liabilities of Ministers with regard to it. Will any one say that a measure like one which proposes to introduce, partially or generally, the system of vote by ballot is a measure of second-rate importance, and consequently one which, if introduced by a Government, cannot, in case of its rejection, fix upon its sponsors the stigma of failure or of inefficiency. When it is remembered for how great a number of years the question of Vote by Ballot was allowed to be a question

of first-rate importance, as among the constituencies of England, when the long-continued and passionate debates which followed the introduction of the English Ballot Bill are re-called, knowing, as all the world knows, that the rejection of the Ballot Bill would have been the rejection of the Ministry which introduced it, and remembering the well-established usage of Parliaments with regard to first-class Government measures, we are forced to the conclusion that the principles which underlie Responsible Government, have only been partially accepted by the legislature of this Colony. As was observed in the former reference to the late Ballot Bill, it was a Bill proposed by Government without any previous demand having been made for it in the country. It was proposed to place two constituencies only under a ballot system of voting. In the course of the Bill's very chequered career, a constituency here and there began to clamour for the privilege of the ballot. Thus it came about that additions were made to the places originally intended to be affected by the measure. The process was as follows: A member would object to the exclusion of his town or district, as if such exclusion were a slight upon the importance of his constituency; then a Minister would in a coy and simple manner protest that he had heard nothing to show the constituency demanded the ballot; next the constituency would hold a meeting, more or less formal in character, and telegraph the result (of course a favourable result) to its member or members. Then an addition would be made to the schedule of places in which vote by ballot should prevail. Such is the history of the Bill. Ill-favoured, disliked, perhaps because of its sudden appearance, its partial character, and probably because so many members naturally enough felt that they were quite in the dark as to the views of their constituencies upon so important a question, the Bill was tossed to and fro until in self-defence a Minister declined to reproduce it, and professed to treat it as practically a private measure. Without noticing the career of this singular measure at greater length, we will merely express the opinion again that, without the observance of those generally accepted rules which underlie the principle of Responsible Government, Responsible Government is in danger of becoming a doubtful privilege which, considering how very costly it is, many may think we could do as well without.

The session has not yet ended, but there is little promise indeed of any satisfactory legislation resulting from it. The members of each House are paid for their services, while those of the Upper House enjoy the prefix of "Honourable" in addition to their daily allowance. Nevertheless, many of those who look askance at Responsible Government, after over thirty years working, profess to believe it is a boon which the country cannot now afford to dispense with. There are many considerations which might be advanced upon the general question, but for the present we have only ventured to direct attention to one principle, viz., that of the Responsibility of Ministers.

JOHANNES HENRICUS BRAND.

The President of the Orange Free State died suddenly on Saturday, July 14. The tributes of respect which, with complete unanimity, have been paid his memory render the performance of the same duty on behalf of the *Cape Law Journal* more than usually difficult.

Her Majesty the Queen, the Earl of Carnarvon, the Earl of Kimberley, the Earl of Derby, and Lord Knutsford (Sir Henry Holland), the leading members of the Cape Colonial Legislature, and the whole of the South African press, have all marked the occasion of the death of Sir John Brand with peculiar emphasis, and as with one voice have accorded unstinted praise to the memory of one who was in a marked degree deserving of high and of heartfelt eulogy.

The career of the late President of the Orange Free State has been narrated again and again. Sir John Brand, as he must be more generally known, had in the course of five and twenty years during which he was President of the Orange Free State, earned the reputation of being a sagacious, tolerant, far-seeing statesman. Possessed of those personal characteristics for which the most retiring of individual members of society are, when they happen to possess them, highly prized in their immediate circle of friends and relatives, Sir John Brand was esteemed not only as a states-

man of profound thought, liberal and tolerant, but also as a man of sterling worth as regarded his private character and actions. As President of the Orange Free State Sir John Brand would not have been blamed had he ignored the influence which it was open to him to use for the benefit of civilisation throughout South Africa. The President wisely and happily showed all through his public career that he realised how impossible for either its own interests or for the common interests of South Africa at large is a policy of selfishness, or of isolation, on the part either of an individual community or of an individual independent State. That such views of public duty were largely shared by the people who, from 1863 until last month, have submitted to his Headship of the Orange Free State is proved by the fact that Sir John Brand has been regularly re-elected President from 1869 onwards, and was moreover generally expected to be again elected for a fifth term next year. Accordingly, we do not mourn a man who was successful merely in connection with his own individual State or surroundings, but rather we mourn a man who performed to the full his duties to his own State but who at the same time saw the consequences of each political action as it was proposed, and who weighed those consequences not only as affecting the Orange Free State but more generally as calculated to injure or promote the common interests, present and remote, of all Europeans throughout South Africa. That his part was no easy one is abundantly proved by the influence which two very trying, very politically important, events have been shown to have had upon his character as a statesman possessed of moderation, political foresight, and administrative capacity. These two occurrences were respectively the war with the Basutos which ended in 1869, and the Transvaal rising of 1880. In the war with the Basutos the people of the Free State, led by the President himself, suffered much and were victorious not without difficulty; yet notwithstanding all this, the Governor of the Cape Colony, Sir Philip Wodehouse, interposed, and protected the Basutos from the consequences of defeat. In the matter of the Transvaal rebellion the Orange Free State, sorely tempted as its population must have been, held aloof, and the President worked hard to secure that independence of the Transvaal Boers which was ultimately accorded to them. As

regards the Basuto settlement of 1869 there can be little doubt but that a President differently constituted, of more purely local tendencies, possessed of fewer qualities of real statesmanship, would at any rate from that time onwards have shown himself somewhat prejudiced against the English Government in the Cape. Happily, prejudice and vindictiveness were alike absent from Sir John Brand's character. With regard to the Transvaal rising, and his part with regard to the accompanying negotiations, all has not yet been said. That Sir John Brand exercised a wise and good influence upon all parties to that most unfortunate proceeding, there can be no question. The fact that the Orange Free State held aloof from the struggle is of itself a splendid testimony to the wisdom, to the moral strength which gave full effect to that wisdom, of the President. For twenty-five years in short Sir John Brand worked devotedly for the Orange Free State, which in spite of all imaginable difficulties became under his rule possessed of a large measure of prosperity, but more especially of a national spirit, and of a sense of responsibility, in its people. Sir John Brand has not been spared to see the immediate results of the rapid succession of recent important developments in South Africa. But most assuredly, thanks to the example which the life and conduct of Sir John Brand will long afford, those upon whom responsibility of any sort, in one and another part of South Africa, may devolve will be very materially assisted towards the adoption of the right course in special circumstances. The Earl of Carnarvon has said of the late President that his word was his bond, that there was no sounder head in South Africa; the Earl of Kimberley, that nothing could have exceeded the fairness and loyalty and the steadiness of purpose with which he conducted the affairs of his State in a difficult time; Lord Knutsford, that his death is a loss, not only to the Orange Free State, but to the whole of South Africa, whose peace he largely maintained by his ability and his good faith and his integrity of purpose.

Such are the opinions which those who in the highest and most onerous positions of the British Government have been brought to form of one with whom they had frequent communication upon questions of far-reaching importance.

Anything like a sketch of the history of the Orange Free State, or of other incidents in Sir John Brand's career, than those above touched upon would be out of place in these pages. One has died of whom it is felt that in South Africa there are few, if any, like him. The ordinary influences, such as those which are found in hopes of gain, of place, of power, of self-aggrandisement, held no place in the constitution of the deceased President, who throughout his well-spent life was a very simple, honest, homely man, learned and literate as, notwithstanding his simplicity of demeanour, he was.

It only remains to add that the President, Sir John Henricus Brand, was the son of Sir C. Brand, late Speaker of the House of Assembly of the Cape Colony, having been born in 1823. He was educated at the South African College, Capetown, and at the University of Leyden, of which he held the degree of D.C.L. He was called to the Bar of England at the Inner Temple in 1849, and subsequently practised at Capetown. In 1858 he was appointed Professor of Law of the South African College, and in 1863 was elected President of the Orange Free State, to which office, as already stated, he has been regularly re-elected since. In 1882, in connection it is supposed with his services for the general good during the Transvaal rebellion, he was created a Knight Grand Cross of the Order of St. Michael and St. George.

THE DIAMOND TRADE BILL.

In connection with the endeavour during the present session of parliament to alter the *personnel* of the Special Court at Kimberley—a Court wholly devoted to the trial of cases arising out of the illicit diamond traffic—it is important that the greatest publicity should be given to the views of the Judges who from time to time take part in the proceedings of that Court. The following letter was addressed by the Judges of the High Court of Griqualand to the Attorney-General, by whom it was laid before the House, and it was subsequently printed by order of Mr. Speaker:—

Judges' Chambers, Kimberley,
June 4, 1888.

The Honourable the Attorney-General,
Capetown.

SIR,—The provisions of Clause 2 of the Diamond Trade Bill published in the *Government Gazette* of the 29th ult. are such that it will probably not be considered out of place for the Judges of the High Court of Griqualand to offer an expression of their views on the subject, no previous opportunity having been afforded them to do so.

This Clause, we observe, is based on the recommendations contained in paragraph 12 of the Report of the Diamond Trade Acts Commission.

We may say at once that we entirely concur in the 12th paragraph of the Report as originally drafted by the President (see page VIII of the Blue Book), and cannot help regretting that this paragraph was not adopted in its original form.

We are all of opinion that the present constitution of the Special Court is thoroughly satisfactory and efficient, and meets all the requirements of the case. We consider that the appointment of members other than Judges to sit in the Special Court constitutes, to a certain extent, what may be described as a popular element in that tribunal, which for the trial of cases affecting the liberty of the subject, even where trial by an ordinary jury is impracticable, it is still very desirable so far as possible to secure.

The Report of the Commission states that "the persons thus appointed (i.e., the non-judicial members of the Special Court) have generally been Civil Commissioners or Resident Magistrates, whose ordinary duties require their undivided time and attention." On this matter very little evidence appears to have been taken by the Commission, and none of these gentlemen were called as witnesses before it. The Judge President of the High Court did give evidence, but he was not asked any questions on the subject, and the only witness who seems to have been examined on the point was the Crown Prosecutor, Mr. Hopley, with whose evidence [Questions 2948-2974] we entirely concur.

We wish to mention that great care has always been taken to arrange the sittings of the Special Court in such a manner as not to interfere with the discharge by its members of their ordinary duties.

The Resident Magistrate of Kimberley is at present absent on sick leave, and we have therefore been unable to ascertain his views; but we are not aware that he has ever found the Special Court work unduly burdensome, or such as to interfere with the performance of his other duties, which it will be borne in mind are shared by an Assistant Magistrate and a Police Magistrate. The Civil Commissioner of Kimberley informs us that during nearly six years' experience he has never found the Special Court work incompatible with or such as in any way to interfere with the discharge of his ordinary duties.

The Judges here have always regarded their share of the Special Court work as roughly corresponding to the share of Circuit work taken by

each Judge of the other Courts, in which latter work, however, the Judges of the High Court have always been ready to assist whenever convenient and practicable; but the work of sitting as a Judge of fact in criminal cases is nowhere else imposed on Judges of the Superior Courts; it is certainly the most disagreeable portion of their duties; and, while prepared to do their utmost to perform any duties which the Legislature may think proper to impose upon them, they cannot regard with satisfaction the probable effect and operation of this clause, if passed in its present shape.

We also desire to point out that, through ill health, to which officials as well as others living on the Diamond Fields are peculiarly liable, and other causes, it is impossible to secure the presence in Kimberley and fitness for work of all the Judges all the year round; that a two-Judge Court is, for many reasons, a very unsatisfactory tribunal; while if three Judges are in future to sit in the Special Court continuously the burden will be intolerable, especially when the large increase in this description of crime, which, as we are informed, will probably ensue from the proposed diminution in penalties, is borne in mind.

For these reasons, if the Government and the Legislature consider some change in the direction indicated by the clause in question to be absolutely essential, while strongly deprecating such change we would at the same time suggest that some of our objections might be removed by making cases under the Diamond Trade Acts triable in future by a single Judge, and retaining the right of appeal to the High Court.

We venture to make these suggestions and observations in the hope and assurance that they will receive due consideration from the Government and the Legislature, to whom we shall feel obliged, should you see no objection to that course, if you will communicate this letter.

We have the honour to be, Sir,

Your obedient Servants,

(Signed) P. M. LAURENCE,
W. H. SOLOMON,
A. W. COLE,

Judges of the High Court of Griqualand.

REVIEWS.

SEARLE'S REPORTS, 1857-1860.*

We are glad to receive Mr. Searle's third volume of Reports of Supreme Court cases for the period 1857-1860. A notice of the second volume will be found at page 119 of last year's *Cape*

* Cases decided in the Supreme Court of the Cape of Good Hope during the years 1857-1860. Vol. III. Edited by M. W. Searle, B.A., LL.B. (Cantab.), Barrister-at-Law and Advocate of the Supreme Court. Capetown: J. C. Juta & Co. 1888.

Law Journal, and the general remarks on Vol. II. may be applied to the present volume. We presume Mr. Searle will in due course publish reports of the cases from 1860 to 1868, when Buchanan's Reports began. When this has been done, we shall possess an unbroken succession of reports of Supreme Court cases. The work to which Mr. Searle has applied himself must be very laborious, and very often irksome. He is entitled to unstinted praise for his energy and patience in following up this undertaking. The case of *Dwyer v. O'Flinn's Executor*, which is reported at length, turned on the construction of Lord Charles Somerset's Proclamation of 1822. The first question raised was whether a woman could be a competent witness in testaments; secondly, whether a natural-born subject born in Ireland was not entitled to make a will with the same solemnities only as would have been necessary in England; thirdly, whether the will, if pronounced invalid, could not have the effect of a *codicil*. The names of C. J. Brand, and Porter (Attorney-General) represent the Counsel who argued these points, while the Bench was occupied by BELL, Acting Chief Justice, CLOETE, J., and WATERMEYER, J. Long and elaborate judgments were delivered, but since the passing of Act 22, 1876, the question of who may witness a will has been set at rest. Nevertheless, there is much in the judgments which must always be of interest and possibly useful to practitioners. The history of the Usury Laws will be found in *Dyason v. Ruthven*. This was an action to recover £65, with interest at 12 per cent. The Court held that traders were at liberty to agree to a charge of interest at 12 per cent., and Mr. Justice WATERMEYER held further that the question as to whether any particular transaction was usurious or extortionate must be determined by the special circumstances of the case. The case seems to be admirably reported, and much of the learning it comprises must always be very useful in cases where a question as to the proper rate of interest in special circumstances may arise.

The volume before us comprises, generally, a very large variety of well-argued cases. We do not notice quite so marked a diversity of opinion among the Judges as was the case in the notice of the last volume of Mr. Searle's Reports. But, after all, the chief object to be attained in a notice of work of this description is to satisfy the profession of its utility for the purpose for which it is

intended. Acting on this basis, we have no hesitation in cordially commending the third volume of Mr. Searle's Reports to the attention of the profession and of the public. It is true changes have occurred in the law since some of the cases were tried and decided, but notwithstanding that fact, there is much to be gained by a perusal of the arguments and judgments even where such changes have occurred. But outside these there are cases upon such subjects as sale by auction, including misrepresentation, conditions, &c. *Meintjes v. Oberholzer et., al.*, interprets words which purported to create a servitude on a farm, there are three or four good cases which introduce the rights of partners, Shipping, Marine Insurance, the Powers and Duties of Trustees and Directors of a Company under a Trust Deed (*Fleck and another, Orange River Mining Co.'s Trustees v. Focking*), the rights of Co-Proprietors, decisions on Indictments, and several cases under the Insolvent Ordinance, besides others. The question of liability for damage to cargo by rats, it will be remembered, was treated of last year in these pages (p. 245) in connection with the case of *Pandorf v. Hamilton* in the Court of Appeal in England, and the cases in this Colony of *Poppe v. Glendining* and *Philip Bros. v. Koof*. The new volume of Mr. Searle's Reports comprises a case on this subject, *Muter's Executor v. Jones*. A reference was made in the article referred to, to a remark found in Roccus as to the keeping of cats on board ship being a protection to the shipowner. In *Muter's Executor v. Jones*, the defendant pleaded specially that no damage or injury had been sustained unless by rats, which he admitted had caused damage, but said that he "took the greatest and best care to prevent such damage or injury, and employed a skilled rat-catcher before leaving port, who diligently did all that could be done to rid the ship of rats, and during the whole voyage out defendant kept three cats on board in proper situations for killing rats; such number being a sufficient number for the ship." The Court, however, whose judgment was delivered by BELL, C. J., after argument, in which every authority seems to have been quoted, held that the shipowner was liable, where there was no special exception in the bill of lading, even though he proved that he took every precaution for the extermination of rats. The question of *causa proxima* or *remota* does not seem to have

come up in this case, which was before the Supreme Court in 1860. The *lex loci contractus* (England), was held to govern the case, and the object of the Edict *Nautae caupones*, which Chief Justice BELL considered the foundation of the law of England on this subject, was "to protect the owners of goods, without reference to the greater or less amount of care bestowed upon them by the parties to whom they were intrusted in order to their preservation."

. . . . The ultimate point at issue was as to the power of a defendant to avoid his liability by proving that he had used the utmost care to prevent the damage complained of.

The volume will, speaking generally, be found to comprise a very large variety of cases, most of them of value now, a small minority only having been affected by some changes in the statute law of the Colony. It should be added that there is a very good index at the end of the volume, and a Table of Cases at the beginning.

THE SOURCES OF THE LAW OF ENGLAND.*

The chief object of Dr. Brunner's work is to point out to the student of English Law the methods by which that law has been built up from the period of the Anglo-Saxons to the time of Sir William Blackstone in 1765. As the translator says in his prefatory note, Dr. Brunner's work presents an application of the Historical Method to the literary material of English law. This the Historical Method of treatment has been followed of late years by many eminent writers, chief among whom are the late lamented Sir Henry Maine and Bishop Stubbs in England, and Mr. Oliver Wendell Holmes in America, whose work on the Common Law of England is one of the most valuable contributions to the subject that has yet appeared.

Dr. Brunner, however, does not attempt to enter the lists with any of these writers. His book is, if one may use the term, a pamphlet. It is less than 50 pages in length; and in that short

* *The Sources of the Law of England.* An historical introduction to the study of English law. By Dr. H. Brunner, Professor in the University of Berlin. Translated from the German, with a Bibliographical Appendix, by W. Hastie, M.A. Edinburgh: T. & T. Clark. 1888.

space he has attempted to give a synopsis of the various phases of the development of English law, accompanied by a brief description of the most important legal works appearing from time to time, with a short biographical sketch of the authors. The Bibliographical Appendix by Mr. Hastie purports to guide the student to the leading works of recognised authority on the principal topics of English law since the date of Blackstone's *magnum opus*. Dr. Brunner's little book is a very useful guide to those interested in the history of the development of the English system of law.

We have further received, but too late for review in this number, *Decisions in Insolvency*, being the Insolvent Ordinance No. 6 of 1843, as amended by Act 38 of 1884, annotated with decisions under the different sections by the Hon. James Buchanan, second edition by the Hon. E. J. BUCHANAN, one of the Judges of the Supreme Court of the Colony of the Cape of Good Hope. Capetown: J. C. Juta & Co. 1888.

DIGEST OF CASES.

SUPREME COURT.

Botha v. C. C. of Queenstown and others. (May 31.)—The Parliamentary Voters' Registration Act, No. 14, 1887, makes final the decision of the Civil Commissioner of the district as to the placing upon or rejection of names from the voters' list, and there is no appeal from such decision, though the Supreme Court has a general jurisdiction to review the proceedings of all inferior Courts upon the ground stated in Ordinances No. 40 and No. 73.

Campher v. Marnitz. (June 7.)—Before action brought, the plaintiff, who was a minor, applied to the Court to appoint him to a *curator ad litem*. Judgment at the trial was given for plaintiff with costs. On taxation the Master refused to tax as between party and party the costs of the application for the appointment of the curator, the Court not having made any order thereon. Notice of an application for an order for these costs was given to defendant who did not resist. The Court ordered the costs of application to be included in the costs of suit.

Schluter v. Thomson, Watson & Co. (June 11-19.)—The defendants were under a charter party the agents for plaintiff, the master of a vessel, and also agents of the charterers. After the due discharge of the ship's cargo, the defendant insisted on the payment by the vessel of a charge for delivering the cargo on shore, and refused to settle the ship's accounts, and so enable the vessel to leave until this account was paid. On the plaintiff taking legal proceedings the defendants withdrew the claim, though not until after the vessel had been in consequence delayed for about three weeks. The defendants pleaded that they acted *bonâ fide* as the

agents of the charterers, and to protect their interests. *Held*, defendants liable in damages for the detention of the vessel.

Knysna Municipality v. Jackson and others. (June 14.)—Under the general Municipal Act, the Knysna Municipality levied a rate. A valuation list was made out, and defendants objected to the amounts at which their properties had been valued. The Municipal Court sat and disposed of the objections. Defendants appealed to the Magistrate's Court, which upheld their objections with costs. In taxation the clerk allowed costs of objection before the Municipal Court as well as those in the Magistrate's Court. The Municipality appealed to the Supreme Court to ascertain whether the order as to costs was within the Magistrate's jurisdiction. *Held*, that the Magistrate had power to award costs, though the costs of hearing before the Municipal Court were wrongly included in the taxation by the Magistrate's clerk.

Re de Montmort. (June 16.)—The applicant, as natural guardian of his minor children, instituted an action on their behalf without first obtaining the leave of the Court. Judgment was given against the minors with costs. Application was now made so as to render the funds of the minors available for these costs. *Held*, that the Court could, after action, ratify the proceedings; and as sufficient was shown to the Court to satisfy it that had the application been made before action, permission would have been given, the application was now granted.

Roberts v. Staples. (June 14.)—Plaintiff sued in the Magistrate's Court for £11 rent. The defendant admitted the debt but claimed in reconvention £12 damages for breach of contract. Plaintiff excepted that this claim could not be set off, as being unliquidated, against a claim for a liquidated amount. The Magistrate sustained the exception and gave judgment for plaintiff without enquiring into the claim in reconvention. On appeal, case remitted to Magistrate to adjudicate on claim in reconvention.

Queen v. John. (June 18.)—The conviction of a prisoner, a labourer, for having forged a pass purporting to be signed by the clerk of the Magistrate, quashed, the indictment not stating, and there being no evidence, that the prisoner was a person who required any pass.

Selim v. Meyer. (June 25.)—The respondent was sued in the Magistrate's Court on two bills of exchange, drawn on him by one Schuler and accepted by respondent, of which appellant was the legal holder. Respondent pleaded payment. He showed that there were three bills drawn under an agreement entered into between the three parties, payable one, two and three years after date. The bills were accepted payable at Schuler's office, Hatton Garden, London. Defendant remitted the amount of the first bill to Schuler, and paid personally the second to appellant. Schuler kept the money, and defendant never applied for or received the bills from plaintiff. Schuler got into difficulties, and defendant thereafter remitted the amount of the third bill to appellant direct. The Magistrate gave judgment for plaintiff, holding that Schuler was defendant's agent, and that there had been no payment to the legal holder. The High Court reversed this decision and gave absolution from the instance (*vide Meyers v. Selim*, 5 *Cape Law Journal*, p. 146). It was admitted that by English law the acceptance was a general one, and that there was no necessity to prove presentation at Hatton Garden. On appeal, the decision of the Magistrate was restored and confirmed.

Queen v. Castleden. (June 29.)—The accused borrowed money from one T, offering to pledge a piano as security. There was no actual delivery of the piano, which was merely pointed out in accused's shop by him to T. The accused afterwards sold the piano, whereupon he was indicted for theft. *Held*, that though there might be a fraud, yet as the accused was the owner and in actual possession of the instrument, he could not be accused of theft.

Queen v. Maynier. (June 29.)—A person convicted before a Magistrate of contravening the Medical Ordinance cannot be sentenced by the Magistrate to

imprisonment as an alternative in case of non-payment of the fine ; the Magistrate in this respect having no greater power than the Supreme Court (*vide Queen v. Nonosi*, 1 Buch. A.C. Rep., 154).

Trustees Walters' Gift v. De Swart. (July 12.)—In a claim for provisional sentence on a mortgage bond, the Court took cognizance of a registered notarial cession of the bond to the plaintiff, said cession not being written on the bond itself (see *Le Roux v. De Villiers*, Buch. S.C. Rep., 1869, p. 90 ; *Bank of Africa v. Harpur*, 4 E.D.C. Rep., 252).

Re Van Zyl. (July 12.)—Applicants were declared elected as joint trustees at the second meeting of creditors in the insolvent estate of Van Zyl. After the meeting an agent "for creditors," not however specifying who they were, wrote to the Master protesting against the election for reasons set forth. The Master in consequence did not move for the confirmation of the election, leaving the trustees to act. The objecting agent took no action. The trustees now moved for the confirmation of the election, but without giving notice to the objecting agent, contending that it was not necessary to do so under the 40th section of the Insolvent Ordinance. Election confirmed.

NOTES.

ACCORDING to existing regulations, upon the decease of a Notary Public in this Colony the protocol of that Notary must be lodged with the Registrar of the Supreme Court, who places it in an ordinary office without any protection from destruction by fire. There are two objections to the present practice. The first affects the deceased Notary's successors, and the other the public. It often happens that a member of a firm of notaries dies ; his protocol containing deeds executed in the firm's office for a long series of years must be sent to the Registrar of the Supreme Court to be lodged in his office ; this course looked at from a practical point of view means that a Notary's partner is deprived of an asset in the business and a real source of revenue, because he can no longer furnish copies of the deeds filed in the deceased Notary's protocol, but must in each case obtain them from Capetown. In some cases this means a considerable loss to the surviving partner. The public, on the other hand, are affected by the fact that their wills and other documents filed in the protocol are removed from perhaps some country town and lodged in Capetown, where they cannot be inspected by the up-country client, who is thus put to additional expense in procuring copies. But more serious than this is the risk run by a large portion of the public of having the whole of the protocols destroyed by fire, for it must be remembered that nearly every

Notary during his lifetime places his protocol in a safe or strong-room, but after his death it goes to the Registrar's office, where no means are adopted for its protection from destruction by fire. To obviate the first objection we would suggest that the rule stand as at present with leave to any partner of a deceased Notary to apply to the Court for leave to retain the protocol in his office upon such conditions as the Court might consider desirable. The other objection can be removed by placing the protocols in a strong-room. This matter is worthy of the consideration of Government, and we entertain the hope that now we have directed attention to it some change will be made in the existing system.

" But there fell from Lord Justice Lindley's lips

These words of discontent :—

' This comes of navigating ships

By Act of Parliament.' "

The above is a quotation, from memory, of the last verse of the *Lay of the Memnon*, which appeared in a recent number of the *St. James's Gazette*. There was nothing particularly interesting about the case of the *Memnon*; she came into collision with another ship and was held by the Admiralty Court to be alone to blame for the mishap; but on going to the Court of Appeal she was more successful and obtained the comparatively favourable application of the *judicium rusticum*. It is, however, interesting to observe that the poetical version of this affair, from its style and fashion, and the place where it appears, may safely be attributed to that "Apprentice of Lincoln's Inn," whose "Leading Cases done into English" something like a decade ago were a source of delight to the readers of the old *Pall Mall*. The "Leading Cases" were afterwards published in a little work, legal in its get up and in all respects save in the modesty of its bulk. Of this book the present writer once possessed a treasured copy; but some friend, with a greater appreciation of legal humour than of the law of *meum* and *tuum*, stole, or rather conveyed, it—and though it has been sought for carefully, and almost with tears, restitution has never been obtained. Accordingly a new copy was ordered and the answer came from the publishers:—"Out of print." Let us hope that Mr. Pollock, now that he has begun again, will find time to give

us a few more "Lays" and ultimately to embody them in a new edition of his poetical rival of the ponderous tomes of Smith.

THERE is probably no legal treatise more familiar to the practitioner in this Colony than *Taylor on Evidence*; and the death of its author, Mr. Pitt Taylor, should therefore not be allowed to pass unchronicled. For many years he was Judge of the Lambeth County Court, where he was known as a sound lawyer, and also for his special antipathy to the trappings of the profession. Counsel appearing in the other Metropolitan County Courts without wig and gown had at all events to offer an apology for their absence; but at Lambeth they were neither worn by the Judge nor was their assumption by those who practised before him encouraged from the Bench. Mr. Taylor, however, will be best known by his work, which has the almost singular merit among legal text-books that it is excellent reading; and the student who has mastered its contents will certainly have obtained a good deal of information beyond the scope of its professed and immediate subject. On one occasion some years ago it may be remembered that, when trying a murder case on circuit, the late Lord Chief Justice COCKBURN laid down the law of evidence on the subject of what constitute *res gestæ* in a manner somewhat different from the views expressed by Mr. Taylor, who accordingly wrote to the *Times* to defend the accuracy of his exposition. It may be wondered what he would have thought of the decision in *Scott v. Sampson*, as to the admissibility of evidence of general reputation in libel cases, and of the remarkable effect given the other day to that decision by Lord COLERIDGE in *Wood v. Cox*. There is a good deal of humour in Mr. Taylor's work, as may be illustrated by the last title in the Index, which runs as follows:—"Zeal, danger of relying on zealous witness, 69, 82; proof of indomitable, in illustrating this branch of the Law, *intra-passim*." It is not often that the index of a law book affords scope for the exercise of this faculty; but Mr. Taylor in this respect has lately found an imitator in Mr. F. W. Maitland, the Index to whose new work on "The Pleas of the Crown" contains the following topical title: "Exclusive dealing (see Boycotting.)"

Cowan v. O'Connor (20 Q.B.D., 642), decides the point that where a contract is made by means of telegrams the contract is completed at the place whence the reply is dispatched by the person accepting the offer. HAWKINS, J., remarked in giving judgment that where, as in the present case, a person opens a correspondence and initiates a transaction by telegram, he must be treated as though he were, through it, speaking to the person to whom such telegram is directed at the place to which he directs it to be sent, and where he intends it to be delivered.

CONDONATION has lately been defined by O'CONNOR, C.J., in the Supreme Court of Natal. We have not as yet the full text of the judgment before us, but it appears that the Chief Justice holds that the forgiving party even when he had himself been guilty on some other former occasion and uncondoned, could by mere forgiveness condone the wife's fault. Some of our legal friends in Natal differ from Chief Justice O'CONNOR, and incline to the view that a guilty husband, although his guilt may be long passed, cannot, logically speaking, condone. We express no opinion ourselves upon the subject, but as it is both novel and interesting, we shall discuss it at greater length on a future occasion.

THE CIRCUIT LIST.

WESTERN CIRCUIT (Mr. Justice SMITH).

Richmond, 10th Sept., 1888.
Victoria West, 12th Sept., 1888.
Beaufort West, 15th Sept., 1888.
Prince Albert, 19th Sept., 1888.
Oudtshoorn, 22nd Sept., 1888.
George, 26th Sept., 1888.

Mossel Bay, 1st Oct., 1888.
Riversdale, 4th Oct., 1888.
Swellendam, 8th Oct., 1888.
Worcester, 11th Oct., 1888.
Malmesbury, 16th Oct., 1888.

EASTERN CIRCUIT (Sir JACOB D. BARRY).

Cradock, 3rd Sept., 1888.
Somerset East, 5th Sept., 1888.
Bedford, 7th Sept., 1888.
Fort Beaufort, 10th Sept., 1888.
King Williamstown, 14th Sept., 1888.
East London, 18th Sept., 1888.
Queenstown, 20th Sept., 1888.

Dordrecht, 25th Sept., 1888.
Burghersdorp, 28th Sept., 1888.
Aliwal North, 1st Oct., 1888.
Colesberg, 5th Oct., 1888.
Graaff-Reinet, 9th Oct., 1888.
Uitenhage, 13th Oct., 1888.
Port Elizabeth, 15th Oct., 1888.

CAPE LAW JOURNAL.

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER VII.

ARRESTS.—PART III.

WHO CAN BE ARRESTED?—To mention who cannot be arrested would still leave in doubt, and questions have frequently been asked as to whether certain persons named can be arrested, and therefore instances of the latter are here given, with the reasons assigned.

(a.) A *Foreigner*, or a person who comes from a foreign jurisdiction to transact business with you, though you know it, and he leaves without settling a debt contracted with you; for though you may know that he comes from another country, you may infer that he means to pay you in cash.

(b.) A *Debtor*, though the debt is *not yet due*; because it may be unjust to the creditor to delay if the debtor is *suspectus de fuga*; so also may a debtor who made the debt conditionally (Neostadius, Cur. Holl., dec. 20; Sande 4, 4, def. 7 and 13; Holl. Cons., Vol. 4, Cons. 191, n. 6; Academie, der Jonge Prac., Chap. 26; Voet, by Buchanan, 2, 4, 20); as also one of co-debtors can arrest the other for his *pro rata* share where they are jointly liable to the creditors.

(c.) A person who has undertaken not only to *give*, but also to *do, something*; for instance, one who has undertaken to make glass for another may be arrested to complete the work, or to indemnify him (Peckius 4, 7).

(d.) A person who is accused of slander or libel, or of any injury or damage caused whether to a person or to a thing.

(e.) An *Executor* of an estate, to account for his administration of the estate of the deceased; for in the person of an executor, the ownership of the debt is not altered, but he is liable not in his private capacity, but in his capacity as executor. So also every other person who acts in a *representative capacity*, to account for what he has done in that capacity; as a trustee of an insolvent estate, an agent to his principal, a guardian for debts contracted by him, &c., &c. (Peckius 4, 12 and 13; Voet 2, 4, 37).

(f.) A *Woman* for her own debts, but not for those of her husband, unless she is a public trader, or they trade publicly together, or she made his debt her own, and whether she has renounced any exceptions, or benefits, or not. For the origin of this law, see the Placaat of Chas. V., of the 4th of October, 1540, G.P.B., Vol. 1, p. 314, § 2; Leonius, Dec. 126; Neostad., Dec. 57; Sande 2, 4, 4; Bort, Chap. 4, § 30 (see also my Chapter on "Civil Imprisonment"); and though she is not a public trader, yet if she contracts a debt beyond the place of her domicile, and in the absence of her husband, she may be arrested (Voet 2, 4, 36).

(g.) A *Husband* married in community of property, for the debts of his wife, contracted by her before as well as during the marriage (Voet, by Buchanan, 2, 4, 36, and see my Chapter "Civil Imprisonment").

(h.) A plaintiff or a defendant, each other, in a pending cause, and so long as the judgment is not yet satisfied (Peckius 4, 16).

(i.) A duly authorised agent cannot be arrested for anything *bonâ fide* done in the name of his principal, in which case the principal only would be bound, and can be arrested; but a person who *malâ fide* gives himself out as an agent of another, and enters into an agreement with a third party, that party may have him arrested for whatever he undertook to do, but failed. But factors, brokers, and clerks may be arrested to account to their principals for what they have done (Peckius 4, 12 and 13).

(j.) Every *Surety*, whether a woman or not, and whether the exceptions have been renounced or not; and one of co-sureties can arrest the other for his *pro rata* share when they are jointly liable to the creditors; and so also can a surety arrest the debtor whether he has paid the creditor and received cession of action, or he is afraid that the debtor may abscond before the creditor can be

aware of it (Peckius, de Jur. Sist. by Van Leeuwen, 4, 9; Vroman 1, 1, 25; Bellum Juridicum, Cas. 16 & 79).

As to a woman, this applies to one who is either a public trader, whether married or not, or she trades together with her husband, or she signs a promissory note, or bill of exchange with her husband (Peckius 5, 14; Schorer 1, 5, 23, and 3, 3, 18; *Smuts, Louw & Co. v. Coetsee*, Buch. Rep. for 1876, p. 55).

But in all other cases, women who have not renounced the *Senatus Consultum Velleianum* exception are not liable as sureties, and cannot be arrested (*Whitnall v. Goldschmidt*, 3 Buch. E.D.C., 314). But the Court will not extend this benefit except to cases where clearly applicable (*Le Roux v. Brink's Executor*, 4 Juta, 74).

(k.) A Notary, to produce certain documents in his custody, executed before him as notary; and so also may any other person to give evidence, and to produce papers in his possession (Peckius 4, 15). But though this is still law, such an order is not likely to be given by a Judge at the present day, so long as there is a chance of obtaining the documents and the testimony of the witness by means of a commission *de bene esse*. If, however, the commission cannot be obtained, or the witness declines to attend it, or he keeps out of the way, then there is no alternative but to arrest him.

(l.) A person guilty of contempt of Court.

(m.) An *Insolvent*, if he intends to leave the Colony without the consent of his trustee or creditors, before his estate is finally liquidated, and before he is rehabilitated (Insol. Ord., §§ 95, 124 and 125; *Still v. Gilbert*, 3 Menz., 124, and *De la Corniellere*, decided 1867, not yet reported).

(n.) *Students*, in Holland, could not be arrested but before their own forum. By an enactment in force in Holland, the Universities there had a forum before which causes affecting students were tried. The students of those Universities could therefore not be summoned before any other but their University Court. A few years ago this privilege was done away with in Holland, and students of Universities may now be summoned before and arrested by the ordinary and usual tribunals. But this privilege of students being purely a local enactment for Holland, never extended to any of the Colonies, and thus was never in force here.

(o.) The *Captain of a ship* for all obligations entered into by him for, or on behalf of the ship. For in this respect he has an authority implied by law as agent to bind the owner or charterer. The creditors may sue the owner, or the Captain, at their option; but the owner may be out of the jurisdiction, in which case it is easier to sue or arrest the Captain (Dig. 14, 1, 1, 25; Roscoe's Admiralty Law and Practice, pp. 46-47). By the arrest of the Captain, as such, the ship cannot leave the port without him.

(p.) A person is not privileged from arrest whilst returning from lawful custody (Chitty's Archibald's Practice, by Prentice, 12th Ed., Vol I., p. 785).

(q.) A minor cannot be arrested for those debts contracted by him, and for which he is not legally liable; but when he might otherwise be legally liable, as, for instance, for necessities of life supplied to him, he may be arrested.

(r.) Members of our Parliament.

(s.) Consuls.

(t.) Clergymen.

WHO EITHER CANNOT BE ARRESTED AT ALL, OR WHO ARE TEMPORARILY PRIVILEGED FROM ARREST.—The general rule is that every one can be arrested for a lawful cause, but the following are the exceptions, and are privileged from arrest:—

(a.) The members of the Royal Family (Chitty's Practice by Prentice, 12th Ed., Vol. I., Chap. 6).

(b.) The Servants of the Queen.

(c.) Peers and Peeresses.

(d.) Members of Parliament in England cannot be arrested there during the sitting of a Parliament, nor for 40 days before or 40 days after the session (Stephen's Comm., Vol. II., p. 356, Ed. 5); and in Holland the Deputies of Cities when summoned for business by the States of Holland, and the Deputies to the Assembly of their High Mightinesses in Holland, while going to, during the sittings, and returning home (Placaaten of 4th October, 1588; 27th July, 1635; and 27th July 1653, G.P.B., Vol. VII., pp. 54 and 55). But this privilege of members of the English and of the Dutch Parliaments is not in force in this Colony. The enactments in England and Holland on this subject, being so purely local, do not

extend to their Colonies, and can be introduced into the Colonies only by Special Act of Parliament, and this has not been done for this Colony. But apart from this privilege being only territorial in England and Holland, it is one of the constitutional principles of Great Britain, that a Colony acquired by conquest, or cession, as this Colony was, remains subject to its own pre-existing laws, and is not affected by statutes of the United Kingdom passed before its acquisition (Stephen's Commentaries on the Laws of England, Ed. 5, pp. 103-108). Now the pre-existing law of this Colony at the time of its cession to England, was the law of Holland, and the Parliamentary privileges of Holland, as already stated, are applicable only to the Legislature of Holland, and do not extend to her Colonies. In introducing a Parliament in this Colony, in 1850, by Letters Patent from the Crown, the privilege of freedom from arrest was not introduced, though by a series of local rules the greater part of the procedure of the British Parliament has been adopted.

In the case of the Sovereign and her servants and of peers and ambassadors, the privilege of freedom from arrest is accorded by the law of nations, and therefore is of universal application (consult Maxwell on Statutes, Chapters 3 and 6).

(c.) *Ambassadors, Plenipotentiaries, or other Public Ministers of Foreign Powers or States*, and their servants and goods such as they require while holding their high position, and whether in going to or coming from the place appointed, or while resident there; because ambassadors are considered to represent their sovereign. The servants of ambassadors that are privileged from arrest must, however, actually be in the service at the foreign Court of the ambassadors.

If an ambassador will not pay his debts while abroad in the service of his State, he is to be recalled home, and if his sovereign will not pay his debts, it is a just cause for a declaration of war, and the money is to be collected *vi et armis* (Grotius de Jur. Bel. et Pac., 2, 18, n. 8 and 9). There is nothing, however, to prevent the ambassador being sued before his own Court if the plaintiff is in a position and willing to do so (*Placaat v. Haare Hoog. Mog.*, 9th Sept., 1679, G.P.B., Vol III., p. 310; *Merula, Man. v. Proc.* 4, 40, 3, 14; *Voet* 2, 4, 43 and 44; *Leonius Dec.*, Cas. 82; *De Pape-*

gaay 1, 298; Stephen's Commentaries of the Laws of England, Vol. II., Ed. 5, pp. 506-512; and V. d. Linden Jud. Prac., 2, 18, 2; Bort., Chp. 4, §§ 6 and 18).

In the reign of Queen Anne of England there was a Statute passed (7th Anne, Chap. 12) which not only makes all process against ambassadors null and void, but renders it a crime to arrest them. This act was passed to pacify Peter the Great of Russia, Czar of Moscow, whose ambassador was arrested in London, in his own coach, for a debt of £50. The Czar resented this affront very highly, and demanded that the Sheriff and the plaintiff, and the plaintiff's attorney, should be hanged for making the arrest (!); and when the British Government refused to do so, he threatened to make war on Great Britain. In consequence of this threat the British Parliament unanimously passed the said Act, which humiliating step was accepted by the Czar as a full satisfaction (Stephen's Commentaries, Vol. II., pp. 506-512).

In the case of the Marquis of Albeville, when as English Envoy in Holland in 1688, he renounced his privilege of freedom from arrest, and was arrested. But it is questioned whether even then he could legally do so (Van Zurk, Codex Batavus, Tit. "Arrest.") Anyhow, reasoning from general principles, he could not do so, and certainly would at the present day not be allowed to do so.

(f.) *Members of Convocation* whilst engaged in business, or going to or coming from it (8th Henry VI., c. 1). But this is in force only in the United Kingdom, and not here.

(g.) *Soldiers or other military persons* while on their march to war, or actually and *bonâ fide* on duty at the time, or who have been duly called out to war; nor their weapons, cattle, horses, or accoutrements. This applies also to burghers on active service (*Casson v. Connolly*, 1 Juta, 68). But this does not apply to a debt contracted by a soldier before he enlisted or joined the regiment, nor when he is *suspectus de fuga*, and joined the regiment with that object (Bort on Arrest, Chap. 4, § 27). But the military accoutrements, if belonging to the State, cannot be arrested for the private debts of a military person; and when a military person is not on a march with his regiment he may be arrested for debts contracted even after his enlistment. For any misdemeanour which a soldier may be guilty of and is liable to be punished by the Civil Courts

he may in addition afterwards be punished also by the Military Courts whatever that form of punishment may from time to time be (Sande de Fris. 1, 1, 4 ; *Bellum Juridicum*, Case 62). The same privileges and disabilities here mentioned apply also to the naval service.

(h.) *Victuallers* or other parties while actually engaged in conveying the necessary provisions to the army, nor while returning home from such duty (Placaaten of 19th May, 1544, and 5th August 1554).

(i.) Persons connected with a case, such as the parties to a suit, their witnesses, counsel and attorneys, are privileged from arrest while attending at Court for the purpose of being engaged in the business of the same, and also whilst going to and returning from the Court, and till they are at home again, *eundo, morando, et redeundo*. A convenient and reasonable time must be allowed to the parties to get home after the trial is over (Voet 2, 4, §§ 39 and 40 ; Pulling's *Law of Attorneys*, 3rd Ed., pp. 397 and 398 ; Chitty's *Practice* by Prentice, 12th Ed., Vol. I., Chap. 6 ; Stephen's *Commentaries*, 5th Ed., Vol. III., pp. 388 and 632 ; *Richardson v. Nisbet & Dickson and the Sheriff*, 3 Menz., 123). But a witness is not privileged if he attends of his own accord, and without being subpoenaed (*Roberts v. Tucker*, 3 Menz., 130).

(j.) The Governor and the Judges, without a special order of the Supreme Court (Rule of Court 9).

(k.) A Woman, for the debts of her husband ; but she is not privileged from arrest for her own debts, or for their joint debts (Neostadius, Dec. 57, and Sande 2, 4, 4).

(l.) Two Foreigners belonging to the same jurisdiction cannot arrest each other, nor each other's goods, in a foreign jurisdiction for a debt contracted in their own jurisdiction, but they may if they are from different jurisdictions (*Wallace v. Hill & Scheneman*, and *Hansloo v. Fotheringham*, 1 Menz., 347 and 352 ; and *Wilhelm v. Francis*, Buch. for 1876, pp. 164 and 216 ; *Dymott v. Pike*, 2 Lau., 55). But a contract made in a country where the law does not allow a personal arrest may, however, if it is to be operative in another country, be enforced by personal arrest in that other country whose laws authorise such a mode of proceeding as part of the local remedy (Story's *Conflict of Laws*, §§ 568-572).

(m.) A *Debtor* at the place to which he had been invited by his creditor to meet him, in order to come to a settlement with him; for this would be contrary to good faith (Peckius, Chap. 7).

(n.) A *Clergyman* whilst performing divine service, or whilst going to church for that purpose and returning from thence (Peckius 4, 14).

(o.) The *debtor of your debtor*, unless your debtor has ceded his debt to you, but you may arrest the debt or money he owes your debtor (Peckius 4, 11, and Sande 1, 17, 1).

(p.) A debtor whose debt does not amount to £15 (Rule 8).

(q.) A *Guardian* for the debts contracted by his pupil without his consent; but he may be arrested for the debts contracted by him in his representative capacity (Coren., Obs. 3, No. 18; Huber Hed. Regts., Vol. II., Bk. 1, Chap. 32, § 4; V. d. Linden, Form v. Proc., Tit. 25, § 9).

(r.) A person who can successfully set up the defence of *litis pendentis*; for an arrest cannot be made in a matter or question about which formal judicial proceedings are pending elsewhere, unless the party is *suspectus de fuga*, and then it is only to give security to satisfy the judgment.

(s.) A *Father* who goes to visit his son who is in a dying state; nor whilst he attends that son's funeral (Utrechtse Consultation, Vol. II., Cons. 141).

WHERE AN ARREST CAN BE MADE AND WHERE NOT.—Under this heading, differing from the previous ones, by giving one general rule and all the exceptions the subject will be at once fully comprehended by the young student.

As a general rule, then, an arrest can be made everywhere and at all places, even on the public road, or in the Temples, if the fear of escape should need it; but to this there are the following exceptions:—

(a.) In a *public school* during school hours; because it is presumed to have an injurious effect upon the pupils.

(b.) In a *Court of Law* during the hearing of a case, or during its usual legal proceedings.

(c.) In a *ship* which serves as a dwelling, having his domicile nowhere else than in the ship; for in this respect a ship is compared

to a dwelling house; but this privilege does not apply to those persons who are only temporary lodgers or travellers in the ship, nor if the ship is ready to sail to a foreign port.

(d.) In *Churches* during divine service. In the olden days arrests were not allowed to be made in churches or cloisters, or other holy places, but on account of the abuse made by persons who resorted there as places of refuge, this privilege fell into disuse, and is now limited only to churches, and then only during divine service.

(e.) In a *Church-yard*, while *bond fide* attending a funeral.

(f.) Two inhabitants of the same territory cannot arrest each other's goods in another territory (Voet 2, 4, 45).

(g.) In *one's own house*. As this part of the subject is of vast and universal importance, and is the one most frequently called in question, I shall treat of it a little more fully than of the others.

A person cannot be arrested in his own house against his will, nor in the house of another person against the will of that person. Any person so arrested is to be immediately released, and he is free from a-re-arrest at the suit of the same person till he shall have reached his house again; but he is liable to be arrested at the suit of another person before he has reached home. The term "house" is here meant one that is used as a dwelling house and it makes no difference whether you have absolute dominion in it, or you have only hired it, or live in it free. It is not necessary that the house should have been originally built as, or subsequently specially converted into, a dwelling house; it is sufficient for the purpose of the benefit of this privilege that it is used as a dwelling house, or the part which you inhabit. Nor does the size, splendour, and magnificence of the building make any difference; or the circumstances, taste and means of the owner; nor does it make any difference whether the house is inhabited by the poorest of the poor, or what kind of house it is, or tent, or covering, or shed, provided it is used as your dwelling. Thus, for instance, the most humble and insignificant hut, if used as a dwelling, frees a person from an arrest therein, and so also if part of your stable or mill is occupied by you as a dwelling, you cannot be arrested on those parts, though you are liable to be arrested if found on other parts used for other purposes. But if access to the other parts of the building cannot

be had, except through the part used as a dwelling, then you will be freed from arrest from those parts also. Thus, for example, as is frequently the case in this Colony, if a person has a shop, or a bottle store, or a canteen, or a drinking bar, which is on the same foundation, or forms part of the same house, and to which access to and egress from can be had only through the parts of the house used as a dwelling; or there is no means of access to the house but through the canteen or shop, &c., it must be looked upon as part of the dwelling house, and you cannot be arrested in it. But, on the other hand, if there be a separate door to the canteen or shop, leading to the street, and through which access and egress can be and is usually had, especially by the public, then, though there be a door connecting it with the part used as a dwelling, you are not freed from arrest in it. When, therefore, the law says you are freed from arrest in your own house it means as a general rule in whatever parts of the house you usually inhabit, or use as a dwelling, and not one, or in the parts which are used for other purposes also.

In the term "dwelling house," something more is sometimes included than the single building which is inhabited by a person; and this depends upon all the circumstances of habitation. For instance, if adjoining, or within close proximity to the dwelling, there are certain necessary outbuildings or outhouses, *bonâ fide* belonging to and used as part and parcel of, and in connection with the dwelling house, then he is freed from arrest in all these buildings also. To ascertain this it is sometimes necessary to take into consideration the habits and customs, and mode of life, taste, occupation, rank, pecuniary means, and all surrounding circumstances of the occupier of the dwelling house. If, according to his rank, and means and habits, he *bonâ fide* requires, and uses all these outbuildings in connection with the free and comfortable, though it may be luxurious, habitation of the dwelling house, and without which the dwelling house, for his purposes, would be uncomfortable and incomplete, they would be included in the term "dwelling house." On the other hand, if a poor person, whose means do not allow of it, or whose habits and tastes or social position do not warrant the use, and who does not use these outbuildings in connection with the dwelling, as part and parcel of the comfortable habitation of

the dwelling, then they are excluded from the term "dwelling house." But these outhouses, &c., must belong to the dwelling house, and be in the same grounds as the dwelling; or at any rate there must be no extraneous ground, or public road, or street between any of them, and all the intermediate spaces must also belong to the dwelling house. Thus, for instance, a stable, coach-house, forage-room, wood or coal-house, w.c., bath-room, scullery, pantry, billiard or smoking-room, the yard, lavatories, fowl-house, servants'-room, dancing-room, conservatory, &c., and all such other necessary outbuildings which can be said to belong to, and form part of, and which are used in connection with, the comfortable occupation of the dwelling house, as such, all come under the term "dwelling house," and you are protected therein from arrest; as also are you protected in, or on, all the intermediate spaces leading from one to the other building, or rooms, &c.; and in addition to these, on an agricultural farm, under the term "dwelling house," are included the cellars, barns or other buildings necessarily used for the storage of the produce of the farm, in all of which you are protected from arrest; also being on the terrace or stoep of the dwelling, whether urban or rural, or the necessary space belonging to and surrounding it; or the precincts of the house; or, as the English law happily puts it, the "courtilages" of the house, protect you from an arrest there. But in a public road through your farm, or to your house, or on a public pavement in a street, in front of your door, you are not free from arrest. So also are you protected from arrest in the garden belonging to the dwelling, and where access to and egress from the house cannot be had but through this garden. But not in a garden away from the dwelling, or through which you need not necessarily have to go, and the public do not usually go to get into or out of the dwelling house. The enclosing or fencing of a whole farm, or all the lands surrounding the dwelling, and the cultivation thereof, do not come under the term garden, which must be taken in its usual and ordinary sense.

Van Leeuwen, in his translation of Peckius, left out a most important passage in the 3rd Section of the 6th Chapter. After speaking of the freedom from arrest in a person's house, &c., Peckius goes on to say (and these are the omitted words), "*et in*

horto ad quem ex domo aditus est." The reason why a person is freed from arrest in a garden, through which access is had to and from the dwelling, is not any where stated by any of the writers, but we can only conjecture that it is perhaps because, especially in ancient days, most dwellings, and particularly in Rome, were surrounded by walls, within which there was a garden, or the whole space within was cultivated into, and kept as a garden, and no approach could be had to the dwelling house except by the one gate, which was sometimes, especially at night, locked.

A person is not privileged from arrest on any other cultivated ground than the necessary garden here mentioned, or in a theatre or circus, or other public place of amusement, though leased by him, or in his club, or in a guard-room, or at the public baths; because all these places are made as places for amusement, or profit, and not made as places for refuge, or to serve as a protection, which dwelling houses are. Nor does the fact of his being in an hotel, or in a boarding-house, free him from arrest, except he is owner of the place, and lives in there with his family; or if in the case of a boarding-house he has hired a room there for at least a year certain. Nor is he freed from arrest in cellars, barns (except in the case of an agricultural farm), store-houses, shops, offices, &c., which form no part of the dwelling house.

But whenever a person is *suspectus de fuga*, no matter where he lives, or for the debts due to the fisc, he is not freed from arrest in his own house (Dig 50, 17, 103, and 39, 2, 5, and 2, 4, §§ 18, 19, 20; Bynkershoek, Op. Om., Obs. 7, 3; Van Leeuwen's *Peckius Van Besetten*, Chap. 6; Bort van Arresten, Chap. 6; *Nisbet & Dickson v. Richardson*, 1 M., 562; *Black v. Rowlands*, 2 Roscoe, 75). In the following case some of the points abovementioned have been discussed, but not decided (*Pocock v. Stoll*. Buch. Rep. for 1868, p. 115).

AT WHAT TIME AN ARREST CAN BE MADE, AND WHAT TIME NOT.—An arrest for *suspectus de fuga* may be made on any day whenever there is danger of delay, whether on a Sunday, or a holy day, or a Feast, or a Fast day (*Peckius* 10, 1, and Bort, Chap. 3, § 17). But if an arrest is to be made on any other ground than that of suspicion of flight, then it cannot be made on a Sunday

(Rule of Court 10, and see my Chapter on "Civil Imprisonment.")

An arrest of any kind may be executed at any hour of the night or day (Voet 2, 4, 24; Bort, Chap. 6, §§ 7 and 8).

ARREST JURISDICTIONIS FUNDANDÆ CAUSA, AND GENERALLY THE ARREST OF A PERSON'S GOODS, OR OF ANYTHING BELONGING TO HIM.—Like in the arrest of a person, so his goods may also be arrested, and this kind of arrest is also divided into two kinds, viz. :—

1. Either in satisfaction of a judgment, or
2. To found jurisdiction.

The attachment of a person's goods to satisfy a judgment will be found more fully treated of in my chapter on "Writs of Execution." But there are many things which under such a writ cannot be arrested, and for such therefore an Order of Court is necessary, and what these are will be found below.

It frequently happens that a person is out of the jurisdiction of the Court, but he has goods there; or, although he is within the jurisdiction, there may be good reasons for arresting his goods. The object in both cases of arresting the goods or things, whether movable or immovable, is either for the sake of founding the jurisdiction on them or of conserving them, in order to prevent them from being removed or otherwise parted with, pending a settlement of either a pending action or one to be instituted, and afterwards to sell them in execution of a judgment to be obtained. Though the defendant is within the jurisdiction and also his goods, as the Court has jurisdiction on both already, the arrest is then sometimes made on his goods, when he is suspected of flight, or there is reasonable fear of a clandestine removal of the goods, or there is fear of dissipation through prodigality; and though the authority of a Judge is as a rule necessary, yet the things of a fleeing debtor may be detained by private authority if there is an immediate danger of the removal of the goods, and there is no time to get a Judge's order; for instance, if a lodger wants to remove his things unexpectedly with intention to defraud the inkeeper of his debt, they are to be detained privately until there can be a handing over to the public authority. You may detain also another's goods or things carried on to your ground, or animals found on your ground,

and where damage is done to you, until the owner satisfies you or gives security (but see Pound Ordinance as to certain animals which must be impounded). This kind of arrest takes place not only before a suit has commenced, but even during it, and at any time after, whenever a frustration of the suit arises; as, for instance, by alienation or transfer of the thing, or by the removal of the thing, until there is security that the judgment will be satisfied.

Though a debtor is arrested, his goods may nevertheless also be arrested and detained, and they may be arrested also, and the creditors placed in possession of them, though he is within his dwelling house, but not yet arrested.

As a general rule the goods of every person can be arrested, and so also of every kind of thing belonging to him, unless they come within the exceptions hereinafter mentioned; and such arrestable goods are arrested and detained by judicial authority for greater security in the pending action; and such goods are to be inventoried and kept in safety, and cannot be removed or sold without the authority of the Court or the consent of the plaintiff, pending a settlement of the suit, unless adequate and approved security be given by the defendant (Peckius 1, 1, 4, and 1, 1, 5 and notes; Merula 4, 2, 25 and notes; V. d. Linden, Jud. Prac., 2, 18, 3-5; Van Alphen's Papagaai, Vol. I., Chaps. 24 and 25; Req. 3-12; Voet 2, 4, §§ 2, 17, 28; Bort on Arresten, Chaps. 1, 2 and 3, and Chap. 8, §§ 30 and 31).

The preliminary proceeding to arrest one's goods is by petition to the Court, supported by affidavit, setting forth the circumstances of the plaintiff's claim, and specifying the goods or property of the defendant to be arrested, and stating where they are, or are situated, and why recourse is had to the extraordinary remedy of an arrest, instead of the usual and ordinary mode of recovery by action, or enforced by writ of execution on judgment. The Court must be satisfied that the petitioner has, *prima facie*, good grounds for his application; if so, it can then make any discretionary order thereon, as to the justice of the case seems reasonable. To the respondent, of course, an opportunity is always given, upon good cause shewn, to have this temporary arrest set aside.

Though the arrest of goods is more easily or sooner granted than the arrest of persons, on the ground that it is not so prejudi-

cial, yet the application for an arrest of goods can be made only to, and granted only by, the Court or a Judge (Voet 2, 4, 50; Bort, Chap. 3); whereas persons may be arrested in certain cases without a Judge's order, under the 8th Rule of Court.

GOODS OR THINGS THAT CAN BE ARRESTED.—Anyone who has a mandate to cite another in law, can also detain his goods for the purpose of founding jurisdiction; even if the mention of making arrest were not made in the mandate (Voet 2, 4, 33); and as a general rule the goods of every person can be arrested, and so also every kind of thing, and for the same reasons as persons who can be arrested. A few things that can be arrested, and on which some doubt sometimes exists by beginners, are here mentioned:—

(a.) A *Ship*, or a *part of it*. If a ship is owned by several parties, the share in her of one of them may be arrested for his debt, though the debts be unconnected with the ship. The owners of the remaining part may, however, release the whole ship so that she may proceed to sea, but the arrest remains good wherever she may go and as long as she remains afloat (Vromans 1, 1, 25; Bort, Chap. 5, §§ 4 and 5).

For the debts of a ship in a foreign port, or in a different jurisdiction, or for the debts or obligations contracted by her Captain on her behalf, or where the ship is responsible for the due delivery of cargo or luggage, the ship may be arrested *jurisdictionis fundandæ causa* (*Wollaston v. Hunt*, and *Dunell & Stanbridge v. Van der Plank*, 3 Menz., 110 and 112; *Lippert & Co. v. Desbats*, Buch. Rep. for 1869, p. 66; *Reid and others v. Crozier & Cloete*, 2 Searle, 183; *re Petunia*, 2 Buch. E.D.C., 271).

The question sometimes arises: In what case should the Captain, and in what case should the ship, be arrested? So far as the obligations of the ship are concerned, it seems to be purely a question of expediency; for the ship is liable for all her debts, and all other obligations entered into by or on her behalf; and so is the Captain, in his capacity as such, as the representative of the owners. In these cases either, or both, may be arrested. But the main object of the arrest of a ship is to found jurisdiction, where before there was no jurisdiction; and suppose judgment to be obtained against the Captain, and he cannot satisfy it, execution cannot issue

against a ship on which you have no jurisdiction until you have founded the jurisdiction. But a ship may sometimes be arrested for no debts contracted either by her or by her Captain on her behalf, but for the debts due to an outside creditor by her owner, who is out of the jurisdiction. In such a case the Captain cannot be arrested, but only the ship; on the other hand, the Captain may have contracted debts or entered into obligations beyond the scope of his authority, in which case the ship cannot be arrested, unless the Captain is part owner of the ship. But where the ship and her owners, and the Captain and the creditors, are all within the same jurisdiction, and do not intend to leave it, then neither the Captain nor the ship can be arrested.

If the ship is to be arrested, the arrest is effected by attaching a copy of the writ to the main mast. An arrest of a ship by an order of the Vice-Admiralty Court is effected by attaching the writ for a short time to the main mast, or the single mast, and by leaving a copy of the writ attached thereto (10th Rule, V.A.C.)

(b.) *Money* of a judgment debtor may be taken from him if in his possession, by virtue of the usual writ of goods and chattels (see my Chapter on "Writs of Execution.") But money of the debtor in the hands of a third party, as for instance in a Bank or elsewhere, can be attached only by an order of Court to satisfy a creditor's claim. To obtain this order a petition must be made to the Court setting forth why the application is made, and where the money is, and what the apprehended danger is of the possible loss or withdrawal of the money if not secured by the Court's order; for instance, if there is a dispute about the particular sum of money lodged in the Bank, or in the hands of a third party; or if the defendant is out of the jurisdiction of the Court, and an action for damages is pending, or about to be instituted against him (*Placaat* 31st January, 1609, and 16th December, 1670, G.P.B., Vol. 4, p. 483; Voet 2, 4, 50; *Whitcome v. Executors of Van As*, 1 Menz., 339; *Mathevs v. Hart*, decided Feb., 1874, not yet reported). In the case of the *Standard Bank v. Kregör & Verster* (decided 24th Jan., 1888, not yet reported) the Supreme Court granted an arrest on the money due to the defendants by the Colonial Government in the hands of the latter, for a debt due by the defendants to the plaintiffs, contracted in this Colony,

though at the time of the arrest they were domiciled in the Orange Free State.

(c.) *Bonds*, or other securities, wherever they may be, except when in favour of the State. Bonds are regarded as movables (Bellum Jur., Cas. 26 ; Sande 1, 17, 6 ; Leonius, Cas 50).

(d.) The *debt* of, or money due by, your debtor's debtor, in his own or in the hands of another, to satisfy so much of the debt as your debtor owes you. In this case also, like an arrest of money in the hands of a third party, the leave of the Court is required to arrest (Sande 1, 17, 1 ; Peckius 4, 11 ; Bort, Chap. 5, §§ 10, 11, 16, 31). But an arrest made by a creditor of the cedent subsequent to the cession, is ineffectual to attach a debt in the hands of the cedent's debtor (*Smuts v. Stack*, 1 Menz., 297).

(e.) Goods held in common by your debtor and another to the extent of your debtor's interest therein, though the thing held in common is in its nature indivisible (Voet 2, 4, 55 ; Bort 5, §§ 4, 5).

(f.) Goods given by a debtor in pledge to a creditor who is your debtor, and which he may also sell after obtaining judgment, provided you pay his creditor his debt for which the goods were pledged (Voet 2, 4, 56 ; Bort, Chap. 5, § 6 ; Zutphen, Ned. Prac., Tit. "Arrest.")

(g.) Landed or immovable property, whether mortgaged or not, of the owner who is not within the same jurisdiction and in order to found jurisdiction on the land (Peckius 5, 21).

Applications are frequently made to the Supreme Court to found jurisdiction on land whether the owners are here or not. This is a mistake ; for the Court has jurisdiction on all land within the Colony without specially asking to found the jurisdiction. But the application should be to interdict and restrain the transfer of the land, either by the owner or by anyone else on his behalf, or by the Registrar of Deeds, pending the time or event fixed by the Court.

(h.) Cattle, horses, building materials, instruments of culture, and all animate and inanimate things.

(i.) Cattle of another found in your grounds or in your field, for the damage done by them. But see the Pound Ordinance (No. 16 of 1847) for such animals as cannot be retained, but must be sent to the Pound.

(j.) If perishable articles are arrested, they must be sold at once or within a reasonable time, for the highest price.

(k.) Goods that you may have sold, but not yet delivered, you may detain till you are paid, unless another arrangement has been made before; but you may arrest such goods, though delivered, if you are not yet paid, for it is understood that the seller remains owner of the goods, though delivered, when no stipulated time of payment has been agreed upon (Grotius 2, 3, 17, and Groenewegen's Notes thereon); and you must claim the goods within six weeks, or demand payment for cash within the same period. If you do not claim within that period, the goods will be considered as sold for credit. But in the case of insolvency of the debtor, this claim must be made within ten days after the sale (Act 38, of 1884, § 11).

(l.) Goods of a deceased person, in possession of an executor, unless there are circumstances which make it advisable that the goods should be realised by the executor.

(m.) Your own goods, if not pledged to another, for your goods may have been removed by force, or have been stolen from you.

(n.) The fruit of another person lying on my ground.

(o.) The subject of a *fidei commissum* for a debt or judgment due by the *fidei commissary* heir (*Maasdorp v. Russouw*, decided in 1872, not yet reported).

(p.) The goods found in a house or on a farm, for the satisfaction of rent due by the tenant or sub-lessee (Van Leeuwen's R.H.R., 5, 7, 24).

(q.) A person's salary or pension (*Re Blackall*, decided 1888, not yet reported).

But the salaries or pensions of military officers are not liable to arrest for more than *one-third* thereof, and not at all for debts under 25 guilders (Res. 3rd May, 1725, and 15th September, 1727, G.P.B., Vol. 8, p. 845). Salaries of clergymen are liable to arrest to one-half thereof only (G.P.B., Vol. 2, p. 2614, § 38).

(r.) Having arrested a person's goods does not free him personally from an arrest if he is *suspectus de fuga* (Voet 2, 4, 19 and 49).

GOODS OR THINGS THAT CANNOT BE ARRESTED.—Though as a general rule goods or things, whether movable or immovable,

animate or inanimate, can be arrested, there are the following exceptions :—

(a.) The goods of the Queen and of the members of the Royal Family ; of the servants of the Queen ; and of foreign ambassadors or of their attendants, and of their servants, which they require while they are stationed abroad at a foreign Court, or while going thither or returning home (Leonius, Cas. 82).

(b.) *Obligations* or *bonds* bearing interest in favour of the State, or on the receivers of the revenue, or for arrear interest (Placaat of 16th March, 1661, G. P. B., Vol. 2, p. 2639, and the *Bellum jurid.*, Case 26).

(c.) *Students' Books* which are necessary for the particular studies in which they are engaged.

(d.) *Military Weapons* and instruments, and the cattle and horses belonging to the army (Res. Holl., 18th Dec., 1657 ; and V. d. Linden Laws of Holland, 4, 3, 6).

(e.) Food for men, and provender for cattle, and other necessary things that are being conveyed to the camp.

(f.) *Ships of War*, nor any of the tackle, apparel or furniture thereof, nor of anything therein, or thereon, that is required or necessary for the purposes of the ship (Van Zurek, Codex Batavus, Tit. "Arrest," § 24.)

(g.) The goods of a wife for the debts of her husband, unless she has taken the debt on herself.

(h.) A *Corpse*, nor the dead body of your debtor. In ancient days the dead body of your debtor was arrested, and kept till the debt was paid by the relatives or the friends of the deceased ; but this law was abolished in order that the dead may be buried, and the corpses not be disturbed as a remembrance of human perdition (Holl. Cons., Vol. 1, Con. 332, and Vol. 3, Con. 142).

(i.) *Alimentation*, or the food one has procured for the day for his necessary sustenance, or even what is bequeathed for one's daily aliment ; and so also whatever one absolutely needs for his necessary daily wearing apparel (Dig. 25, 3, and 42, 3 and 5 ; Voet 2, 4, 51 ; Peckius, 5 14 ; see also the Insolvent Ordinance, § 59).

(j.) The pension of a widow of a clergyman allowed her by the State (G.P.B., Vol. II., p. 2613, Art. 32 of Placaat of 1st April, 1660).

(k.) *The wages of sailors*, excepting for house rent incurred and necessary food and clothing bought *while in service*, but not before (Placaat 18th Dec., 1653, G. P. B., Vol. 1, p. 967).

(l.) Two Foreigners belonging to the same jurisdiction cannot arrest each other's goods in another jurisdiction (*Wilhelm v. Francis*, Buch. 1876, p.p. 164 and 216; *Einwald v. The German West African Company*, 5 Juta, 86).

(m.) *Clergymen's Pensions*, the half thereof (G. P. B., Vol. 2, p. 2614, Art 38). But this of course applies only to pensions granted by the State.

GENERAL.—The arrest of *movables* is effected by making an inventory, and retaining possession thereof (Ordinance 37, § 8). That of immovable property by describing its situation and extent, and by lodging a notice thereof with the Registrar of Deeds, and serving a copy on the owner and upon the occupier (Rule of Court, 363). The arrest of a ship is effected by attaching the writ for a short time to the main mast, and by leaving a copy of the writ attached thereto (10th Rule of the V. A. C). The R. M Courts have no jurisdiction to arrest persons *suspectus de fuga*, though they have for civil imprisonment for their own judgment debts, but they may arrest movables only, nothing else, and for the payment of rent only, to the extent of their jurisdiction (Act 20 of 1856, § 26, and Rules thereunder 52 and 53.)

To arrest a person at least £15 must be due, but no money value is required in order to arrest goods. When goods have been arrested to abide the result of an action, execution in satisfaction of such judgment to be given may issue against these goods without any further order of Court.

Like in the arrest of persons, so in goods, the Sheriff cannot release these goods from the operation of the arrest, except in the case of the writ just mentioned, without the previous order of Court or the consent of the parties (Bort. 8, 20, 31).

To attach goods by virtue of a Circuit Court process, the same proceedings, under similar circumstances, must be resorted to as in the Supreme Court (Rules 165 and 166); and such process must be made returnable on the first Circuit Court day (Rule 167).

If a person's claim does not amount to £15, there is nothing to prevent him from buying up claims from others, and *bonâ fide* getting cession thereof for value received, so as to swell his claim to the arrestable amount, and then have the defendant arrested. But the new claims, or cessions, must be specified in the affidavit to arrest, to shew the *bonâ fide* nature of the transaction.

In the case of a person the arrest must be confirmed on the return day of the writ, except where bail is given; and so also was it formerly in regard to the arrest of money, or goods, the defendant was summoned to hear the arrest confirmed (*in re the Insolvent Estate of Van As*, 1 Menz., 339). But of late years the practice has been when the Court gives an order for the arrest of goods, or money, &c., to grant also a rule *nisi*, calling upon the defendant to shew cause, on the return day thereof, why the rule shall not be made absolute, or the arrest abide the further order of the Court.

In every instance where a person may be arrested, his goods are also liable to arrest; but not necessarily the converse, for instance :—

(a.) You may not arrest the debtor of your debtor, but you may arrest his goods.

(b.) You may not arrest insane persons, but you may arrest their goods.

(c.) You may not arrest persons under the guardianship of another for a debt contracted in their name by the guardian, but you may arrest their goods.

(d.) Though you may not arrest an ambassador, or certain goods of his, you may arrest such of his goods as are not required for, or form part of, his ambassadorial purposes.

(e.) Though you may not arrest the Governor or a Judge without an order of Court, you may arrest his goods without such an order.

(f.) You may not arrest representatives of another, or of estates, for acts or defaults not their own, but you may arrest the goods of the person or the estates they represent.

The arrest *suspectus de fuga* has several things in common with an arrest for civil imprisonment, on an unsatisfied judgment, and *which are the same* in the following cases; for example :

(a.) The mode of arrest, and the time when, and the place where.

(b.) The Sheriff's liability for escape.

(c.) The re-arrest, after escape from lawful arrest, without a fresh order of Court.

(d.) The personal arrest by a creditor, when there is *periculum in mora*.

(e.) The arrest must be personal of the debtor, or of the defendant.

(f.) The gaoler's liability for escape from gaol.

(g.) The discharge from gaol without an order of Court, or consent of parties.

(h.) The maintenance in gaol.

Arrest differs from civil imprisonment in the following respects, as the parallel column here shews, but only *till judgment* is given; *after which* the defendants are on the same footing, and may be sued for civil imprisonment, but if they attempt flight before this decree is obtained, they may be arrested by an order of a Judge.

ARREST.

(a.) Detained in gaol till bail, or till judgment, is given.

(b.) To be arrested to answer an action, or to give security in case of *suspectus de fuga*.

(c.) To be arrested under 8th Rule of Court, or by order of a Judge.

(d.) Surrender of an estate has nothing to do with the arrest.

(e.) On judgment being given, the defendant is discharged from imprisonment, if not out on bail, but he may afterwards be sued for civil imprisonment.

(f.) Defendant can only be imprisoned till judgment is given.

(g.) Cannot be arrested by an R. M. Court judgment.

(h.) May be arrested to do, or not to do, any act or fact.

(i.) May be arrested in his representative capacity.

CIVIL IMPRISONMENT.

(a.) Detained till debt is paid; or in R. M. Court judgment, fulfilment of sentence of imprisonment.

(b.) Only in satisfaction of a judgment debt already obtained.

(c.) By ordinary writ, do.

(d.) When surrendered can not be arrested, and if imprisoned it is in discretion of Court to discharge from imprisonment.

(e.) See *b*.

(f.) See *a*. and *b*.

(g.) May be arrested by R. M. Court judgment.

(h.) See *b*.

(i.) Can not be imprisoned in his representative capacity, but may be in his private capacity for an act done in his representative, if the Court should think his acts and conduct warrant it.

(j.) Certain persons are privileged from arrest.

(k.) May be arrested on a Sunday.

(l.) All goods can be arrested except privileged, and for any cause: except by R M. Court judgment, then only goods for, and to the extent of, rent due.

(m.) An arrest may be discharged by anticipation.

(n.) Arrest can be granted only for certain good grounds.

(o.) Cannot be arrested for any claim under £15.

(p.) Writ must be returnable on first Court day, if possible.

(q.) Arrest must be confirmed on the return day of the writ, except when bail is given.

(r.) Arrest is often the beginning of an action, but also during the action to abide by its result.

(s.) In arrest, copy of the writ must be served on the defendant.

(j.) No one in this Colony, is privileged from civil imprisonment.

(k.) Can be arrested on a Sunday only when defendant is suspected of flight.

(l.) No goods arrested.

(m.) No such thing in civil imprisonment.

(n.) See b.

(o.) Can be arrested for any judgment debt, however small.

(p.) Writ may be returnable at any time.

(q.) No confirmation necessary.

(r.) See b.

(s.) Defendant not entitled to copy of the writ.

IN WHAT CASES PERSONS AND GOODS ARE RELEASED FROM AN ARREST IPSO JURE:—

(1.) Death releases a person from arrest, but not his goods.

(2.) By solution or payment of the debt or obligations on which the arrest is founded.

(3.) By giving satisfactory security *de judicio sisti, et iudicatum solvendo*, and by choosing domicile there (Sande 1, 17, 2; and Bort. Ch. 8, § 4.)

(4.) When the arrest is void *ab initio*, or set aside (Peckius, Ch. 45; Bort, Ch. 8.)

C. H. VAN ZYL.

THE LAW OF LIMITED LIABILITY JOINT STOCK COMPANIES.

PART I.

The creation of commercial companies with limited liability is a comparatively modern innovation in English Law. The Common Law of England only recognised as companies or corporations

those associations of persons which were incorporated by Royal Charter, by special statute, or by prescription. In the early part of last century the South Sea Bubble craze became so extensive and popular that a number of companies for all kinds of purposes were formed. These companies, however, were nothing more or less than gigantic partnerships. Every member was able to bind his fellow partners by his contracts; every member was liable to the extent of the whole of his fortune for the partnership debts; every member would have to sue and be sued individually; and no member could transfer his interest in the company without the consent of all the others. But so strong was the speculative mania that in spite of all these difficulties company-forming on this basis went on to an incredible extent. The legislature at first regarded these companies as nuisances, and in 1720, at the instigation of the famous South Sea Company, which was jealous of its smaller numerous rivals, the "Bubble Act," condemning the formation of such companies, was passed. But they continued to increase in spite of Acts of Parliament. More than a century passed without any further legislative notice being taken of their existence. However, in 1826 an Act was passed allowing banking companies to sue in the name of a public officer on complying with certain regulations. In 1834 another step was taken, and the Crown was empowered to grant to companies by letters patent, without incorporation, certain rights of suing and being sued through an officer, each member still being personally liable for the debts of the whole body. In 1844 an Act (7 and 8 Vict., c. 110) was passed allowing all companies to obtain a certificate of incorporation without a charter or special Act, providing they obeyed certain conditions and registered themselves in an office in London. In 1855 a new and important change was made. Up to that year members of a company, however formed, were each individually liable to their last farthing for the debts of the undertaking. In that year the principle of limited liability was introduced by 18 and 19 Vict., c. 133; shareholders being enabled for the first time in the commercial history of the world to limit their liability to the value of their individual shares. In 1856 and 1857 Acts were passed repealing the Acts of 1844 and 1855, and making new and

improved provision for the limitation of liability of joint stock companies. By these Acts the whole principle of registration was changed. Instead of the deed of settlement being registered *after* three-fourths of the capital had been applied for and ten per cent. upon the shares had been paid up (and probably large liabilities had been incurred), the system was changed so that a memorandum of association prepared in accordance with the provisions of the Act, signed by any seven or more persons, could be filed, and they would then form an incorporated company with or without limited liability, as they might determine. But further reform became desirable, and in 1862 all the previous Acts were repealed and their principles consolidated into the Companies' Act, 1862 (25 and 26 Vict., c. 89). In 1867, after five years' experience of the Act of 1862, the Companies' Act, 1867 (30 and 31 Vict., c. 131) was passed. These two Acts have been constantly amended, altered, added to and improved, but they still remain the basis of the present Joint Stock Companies Law of England. The Act of 1862 is divided into nine parts, dealing with the following subjects:—(1.) The constitution and incorporation of companies and associations under the act; (2.) the distribution of the capital and liability of members; (3.) the administration and management of companies; (4.) the winding up of companies; ⁽¹⁾ (5.) the constitution of a registration office; (6.) to provide for the application of this Act to companies registered under previous Joint Stock Companies' Acts; (7.) companies authorised to register under the Act; (8.) application of the Act to unregistered companies, and (9.) repeal of Acts and temporary provisions.

The Act contains 212 sections, besides three long schedules of regulations for management. Although the Companies Act of 1862 seems to treat the subject in such an exhaustive manner, it was discovered soon afterwards that further provisions were needed and so in 1867 the "Companies' Act, 1867" (30 and 31 Vict., c. 131) was passed. This Act provides chiefly for (1.) reduction of capital and shares; (2.) calls upon shares; (3.) transfer of shares;

⁽¹⁾ A special Act of our legislature to make provision for the winding-up of Joint Stock Companies having been passed in 1868, we do not propose to deal with this part of the subject in this article.

(4.) the creation of share warrants to bearer ; (5.) the manner of making contracts ; (6.) general meetings to be held within four months from registration.

Three years afterwards the Joint Stock Companies Arrangement Act, 1870 (33 and 34 Vict., c. 104) was passed, which enabled a majority of creditors of a company to bind a minority in matters of compromise or arrangement.

In January, 1877, JESSEL, M. R., decided in *Re Ebbw Vale Steel, Iron and Coal Company* (4 Ch. D, 827) that the Companies' Act of 1867 contained no provision for enabling a company whose paid-up share capital had been partially lost to write off that loss by reducing the nominal amount of each share. He said "when a Joint Stock Company has lost a portion of its capital, nothing can be more beneficial to the company than to admit that loss—to write it off ; and, if it chooses to go on trading, to trade with the diminished capital that remains, the dividend being declared on the capital actually remaining. The object of the present application is to authorise this to be done : that is, a portion of the share capital having been lost, it is desired that something should be written off each share so as to make the share of less nominal value, and to enable the company—still going on trading—to pay a dividend on the amount of the capital actually remaining ; but, as I understand the Companies' Act, 1867, such was not the object of the Act." These words were not spoken without effect. In the following July the Companies' Act, 1877 (40 and 41 Vict., c. 26) was promulgated, which meets the case just referred to, by authorising the reduction of paid-up capital.

The disastrous failure of the City of Glasgow Bank—a banking company of unlimited liability—in October, 1878, in consequence of which ruinous calls were made upon its shareholders, showed the necessity of some provision by which existing companies could be registered with limited liability under the Companies' Acts. This alteration in the law was effected in August of the following year, when the Companies' Act, 1879 (42 and 43 Vict., c. 76) was promulgated. This Act also makes a complete system of audit necessary in the case of all banks thereafter registered with limited liability. This was followed by the ambiguous Companies' Act of 1880 (43 Vict., c. 19) dealing with the return to

shareholders of accumulated profits in reduction of paid-up capital. The Companies' Act of 1883 (46 and 47 Vict., c. 28) comes next, making salaries and wages of clerks, servants and workmen (with certain limitations as to period and amount) a preference upon the assets of the company. This Act was followed by Chapter 30 of the same year, entitled the Companies (Colonial Registers) Act, 1883, authorising companies registered under the Companies' Act of 1862 to keep local registers of their members in British Colonies, and so facilitating the transmission of shares. This brings us down to the present time, and we observe that the Imperial Legislature is again contemplating a further change for the better in the principle of registration.

It may here be added that conventions were entered into by the British Government with France, in 1862, with Belgium in 1862, with Italy in 1867, and with Germany in 1874, by which Joint Stock Companies constituted and authorised in conformity with the laws in force in the one country, might freely exercise in the dominions of the other all their rights, including that of appearing in tribunals to sue or defend.

Thus we see that notwithstanding the enormous press of legislative work on the English Parliament, it has found time and means from year to year to keep this most important branch of commercial law up to the requirements of the age. We have now to see how our Colonial legislature, with not one-hundredth part of the heavy strain on its resources, has managed to neglect and forget its duty in this respect.

On the 14th of August, 1861, the Act No. 23 of 1861, entitled "An Act to limit the liability of members of certain Joint Stock Companies," was promulgated. This Act forms the present law upon the subject.⁽²⁾ Its system is the registration with the Registrar of Deeds of the Deed of Settlement of the company, and a list of shareholders holding shares to the amount in the aggregate of not less than three-fourths of the nominal capital of the company, who shall all have paid in respect of their shares a sum of not less than ten per cent., and the payment of this percentage must be acknow-

(2) Act 23 of 1861 originally excluded Banking Companies from its operation, and they remained so excluded until the passing of Act 11 of 1879, which enabled them to participate in the provisions of the original Act.

ledged in or endorsed on the Deed of Settlement of the company. This Act is strangely enough almost a transcript of Act 18 and 19 Vict., c. 13, with the addition of a few sections from Act 7 and 8 Vict., c. 110, *both of which Acts had been repealed some four or five years before the introduction of the Colonial Act!* It is scarcely necessary for our purpose to go minutely into the details of this Act. It is sufficient to say that it took over almost verbatim sections 1 to 12 of 18 and 19 Vict., c. 133 (promulgated in 1855, and *repealed* in July, 1857), and sections 11, 12, 50, and 66 of 7 and 8 Vict., c. 110 (promulgated in 1844 and *repealed* in July, 1856). The principle is, as we have stated, the registration of the Deed of Settlement of the company *after* three-fourths of the shares have been taken up, upon which at least ten per cent. of the value of the shares has been paid; upon this being done and other formalities complied with, the Registrar of Deeds is authorised to grant a certificate that the company has been registered with limited liability. The shareholders then become privileged, inasmuch as they are not liable beyond the amount unpaid upon their shares, and the Directors are bound to perform certain duties such as furnishing the Registrar of Deeds with half-yearly returns of all transfers of shares—a duty which is practically as useless as it is inconvenient.

In 1856, as we have shown, the whole principle of the registration of Joint Stock Companies in England had been changed for the better, but in 1861 our legislators with singular conservatism adopted the antiquated principles of the already repealed English Acts. It is a curious coincidence that in 1864 the Natal Legislature passed Law No. 10 of 1864 limiting the liability of members of certain Joint Stock Companies. This law is almost a copy of the Cape Act, and has never been repealed; so that our sister Colony is as far behind the times as we are in regard to this subject.

During the present year, however, an ill-drafted Bill was presented to the Colonial Parliament dealing further with this matter among some others. Happily for thousands of shareholders in this country, it was almost re-drafted after its first appearance in the *Government Gazette*, and in its amended shape it has become law as Act No. 13 of 1888. This Act, so far as it concerns the subject before us, can only be regarded as a tinkering measure. We do

not describe it thus because it is not of much utility, but rather because the matter is one of such serious importance that when an attempt at amendment was made it should have been by way of thorough re-organization. The Act we are now referring to is, however, of value inasmuch as it admits the thin end of the wedge. It was absurd under the original Act of 1861 to require that in the event of a registered company wishing to increase its capital it could not do so before the Supplementary Deed of Settlement providing for the increase had been signed by three-fourths of the new shareholders, and each of them had paid ten per cent. upon their shares, and at the same time to prohibit any company under penalty from advertising the proposed increase of capital or in any way treating it as capital before such increase had been registered with limited liability in the prescribed form. Yet for twenty-seven years that has been our law. But fortunately the Act of this year makes better provision for the registration of additional capital (§ 12). Section 2 authorises a company to change its name upon certain conditions; Section 3 provides for incorporation, and Section 4 authorises the issue of fully-paid-up shares for services rendered for property or other valuable considerations, such shares to be ranked as though they had been fully paid up in cash.⁽³⁾ Section 5 authorises the issue of share warrants to bearer, and is almost a transcript of sec. 27 of 30 and 31 Vict., c. 131, and so sections 6-11 are but slightly varied from sections 28-33 of 30 and 31 Vict., c. 131. Thus we see that after a period of twenty-one years our legislature has summoned up sufficient energy to adopt a few sections of an English Act of much great commercial importance. In all there are but 12 paragraphs. As far as they go they are good, but they do not go far enough. The numerous other details connected with the subject are left just as they were twenty-seven years ago. Shareholders in this country are as a rule a tolerant class of people; they are seldom heard unless a com-

(3) The original draft of the Bill provided that the Law of England should prevail where no special local legislation was repugnant thereto. Section 25 of the Companies Act of 1867 would have been the ruin of a large number of shareholders in this country had the original section of the Bill been passed. Sec. 4 was, however, probably inserted in view of the recent decision *In re The Almada and Trito Co.* —*Allen's Case*—4 *Times Law Reports*, 534 (May 10, 1888). If so the provisions of the section do not go far enough. We shall refer to this section again in a future article.

pany is very prosperous, and then they show their interest by picking holes in the management and so on, but if the company comes to grief they bear their loss like Stoics, and if they then discover that the company has not been registered they pay whatever the liquidator demands from them, and they are ready on the morrow to apply for more shares in a new company of equally doubtful origin. This is, as it appears to us, the reason why our reports are so bare of that class of case so frequently occurring in the English Law Reports where contributors apply to have their names struck off the register; and it is also the reason why there has been no agitation for the amendment of our existing antiquated law of 1861.

To compare the English and Colonial Acts, and to enumerate the defects of our Colonial law, would occupy a small volume. It would mean re-writing the English Acts with a commentary upon each section. There are something like 380 sections in the English Acts and regulations as compared with our total of about 23 sections. The commentary therefore would be somewhat monotonous. We shall, however, have something more to say upon the subject on a future occasion. But the main difference upon which almost everything else depends is the difference in principle. The English principle is "Register the company first and then incur liability." The Cape Colonial principle on the other hand is "Incur the liability first and then register the company."⁽⁴⁾ We leave our readers to judge which is the better. Should the modern principle be selected, the other details follow in easy sequence, for the English Acts and the decisions upon them afford a guide which probably could not be bettered.

We live in a time when shares and companies form one of the most important topics of the day. Our law upon the subject is confessedly bad and incomplete. The same law was repealed in England thirty-two years ago. The English Statute Book supplies a model for us to copy. A perusal of the English Acts will show that the Imperial Parliament, unlike the colonial legislature was not content with a crude and ill-principled measure, but in its place

⁽⁴⁾ This principle does not, since the promulgation of Act 13 of 1888, apply to increase of capital. Section 12 makes provision for registration of such increase directly the resolution authorising it has been passed.

from year to year as the necessity arose substituted legislation which, although not absolutely perfect, deals with the company from its inception to the details of its management, and to a very great extent affords both shareholders and creditors that protection to which they are entitled and for which purpose the idea of limitation of liability of Joint Stock Companies first originated.

CONDONATION IN SUITS OF DIVORCE.

Some interesting comments have been made in the Natal press on a case tried in the Durban Circuit Court in June last, before the Chief Justice, Sir HENRY CONNOR, and reported in the last number of the Natal Law Reports (9 N.L.R., 106). The case is that of *Thompson v. Thompson and Benez*, which was a divorce suit brought by the husband against the wife on the ground of her adultery with the co-respondent, from whom damages were claimed. The history of this suit is certainly a peculiar one, and probably no reported case will be found in which the facts are mainly similar to those there divulged. The plaintiff and defendant were married in England, where the wife committed adultery, in consequence of which the husband left her and came to Natal, where he lived in adultery with a woman whom he had brought with him. This woman subsequently left him and he sent for his wife, who came out to him and cohabitation was resumed, with full knowledge on both sides of the offences committed. It was alleged that the wife subsequently committed the acts mentioned in the declaration, and on account of which relief was prayed. The wife in her plea accused the husband also of adultery, to which the reply was the general denial.

The Counsel for the defendant argued that the adultery of the husband with the woman who came with him from England debarred him from the right to a divorce, notwithstanding the admitted fact that the wife had pardoned that offence. The contention was that she having been herself guilty of the same offence had no power to condone it in her husband, that none but an innocent party could condone; the effect of condonation being the waiver of a right of action, and a party who has no right of action

cannot waive it, and therefore cannot condone. "One act of adultery is sufficient to bar the offender from ever obtaining a divorce; if both parties are guilty, neither can condone, and no divorce can be decreed." Such are the words reported to have been used by the defendant's counsel in the case; but, as Sir H. CONNOR pointed out, he cited no authority in support of this extreme view.

That no such authority could be found is certain. Voet (24, 2, 26) says that the like offence committed by both spouses *pensatione tollatur*, and that neither has a right of action against the other. He goes on to say, however, that if after the adultery of one of the spouses a reconciliation takes place between them, and subsequently the formerly innocent one who forgave the other falls into the same offence, it would seem that humanity would dictate that the one who was first pardoned should now pardon the other; but he adds that there is nothing in law to bind him or her to do so, and the offence which had been condoned cannot debar the offender from the right of divorce, "because an offence once wiped out (*abolitum*) by forgiveness cannot be revived." This disposes of the assertion that "one act of adultery is sufficient to debar the offender from ever obtaining a divorce."

Possibly the learned Counsel who used the language was led away to say more than he really meant. His main point was that when the parties to the suit agreed to live together again there was no condonation on either side; because condonation means a giving up of a right of action, which neither of these parties possessed against the other. The Chief Justice properly drew the distinction between *condonatio* and *compensatio*; for if the former supposes the waiver of a right of action, the latter certainly does not. It merely means that the offence of the one spouse is balanced by the offence of the other, and this is exactly how Voet puts the matter.

If, then, one who has committed adultery, but whose offence has been *condoned*, does not lose the right to a divorce in case the other spouse is subsequently guilty of the same offence, why should one whose offence has been *compensated* be in a different position? There seems to be nothing in law or reason to support the distinction. The view taken by Chief Justice CONNOR appears to be the correct one. When the parties to this suit came to live together

again, there had been a wiping out of the offence on either side, and each was "innocent *quoad* the other." The past was, in fact, a *tabula rasa* as between them, and each had thenceforth the right to expect conjugal fidelity from the other. The lapse of either into infidelity gave the other the right to a divorce, and his or her former offence being a *crimen remissione abolitum*, could not be revived as a bar to the right.

REVIEW.

DECISIONS IN INSOLVENCY.*

This useful "little work," as the learned author when on the Bench used to call it, has reached a second edition, under the editorship of the Hon. Mr. Justice EBENEZER BUCHANAN. It is unfortunate a further amendment to the insolvent law should have been made by the Legislature by Act No. 22 of 1887, too late for incorporation in the pages of this edition. The editor, however, takes care to inform the reader of the provisions of this later Act, but conceals the information in the short summary of the sections, where it is hardly likely to be found except by chance. However, as the amendment in question only deals with the method of the publication of the periodical lists of uncertificated insolvents, its omission does not much affect the value of the work to the legal profession or general public.

The index is considerably enlarged and consequently improved, and while the first edition contains references to about 268 reported cases the second edition contains a digest of some 420 decisions of the Colonial Courts, most or perhaps all of which additional cases have we presume been reported since the publication of the original work in 1879. Like its predecessor, this edition professes to contain an appendix of the most useful practical forms relating to insolvent estates, but as a matter of fact this part of the work is not very useful or complete. There are no forms relating to the compulsory sequestration of estates, to the liquidation and distribu-

* *Decisions in Insolvency*, being the Insolvent Ordinance No. 6 of 1843, as amended by Act No. 38, 1884, annotated with decisions under different sections. By the Hon. James Buchanan. Second Edition, by the Hon. E. J. Buchanan. Capetown: J. C. Juta & Co. 1887.

tion of the assets, or to the general questions of law such as the removal of trustees by reason of absence or otherwise. In a future edition this portion of the work might with advantage be considerably amplified. The printing, binding, and general get-up of the book is excellent, and take it all round, it is a very valuable addition to the legal literature of South Africa.

DIGEST OF CASES.

SUPREME COURT.

Re Otto. (July 24).—A testator bequeathed his immovable property to certain minors. The executors applied to the Court for an order authorising the sale of the property for the purpose of paying the debts of the testator. The application held to be unnecessary, as the executors duty was to pay debts first before legacies.

Hiddingh v. S. A. Association. (July 13-Aug. 1).—It is the duty of executors, unless otherwise directed by the will, to realise the estate of the testator within a reasonable time. Under ordinary circumstances six months would be such reasonable time. Where the testator held shares in a Bank with unlimited liability, which shares were practically unsaleable, and after the expiration of six months the Bank was liquidated and calls made on the shareholders: *Held*, that as there had been no unreasonable delay or negligence on the part of the executors, the estate and not the executors personally were liable for the calls. The executors held (by Privy Council) personally liable for loss suffered by the fall of the market in shares which might have been sold within six months, but which had been held over *bond fide* and sold afterwards.

Executors Twentyman v. Botma. (Aug. 1).—Provisional sentence granted under indemnity on a mortgage bond, and property mortgaged thereunder declared executable without the production of the original bond, the Court being satisfied that no one besides the plaintiffs had any interest therein, and that the bond had not been ceded, but had been mislaid in the office of the attorneys, public notice, however, to be given of the circumstances, before the property should be sold in execution. (*Vide Iles, q.q. and Lawrence v. Martin*, 1 Menz., 68).

Daumas v. Jefferson, N.O. (Aug. 1).—A medical man held entitled to a preference for medical fees for attendance during the last illness of a person whose estate was subsequent to his death sequestrated as insolvent. (*Vide in re Roux*, 2 Menz., 318).

Burger v. Cape Central Railway. (Aug. 1).—Where land has been expropriated in the manner provided by Act No. 6, 1882, either party may come to the Court to have the award of arbitrators made a Rule of Court, and any cost so incurred become costs in the arbitration, unless it is proved that the application was wholly unnecessary. *Semble*, that the taxing officer has no authority to tax bills of costs except in judicial proceedings.

Oudtshoorn Municipality v. Wiggett. (Aug. 1).—The defendant was prosecuted criminally for contravening a certain municipal bye-law as to slaughtering within the town. The Magistrate's clerk by an oversight omitted to fill in the date when the offence was committed, in the summons. On exception taken, the Magistrate dismissed the case, and on the application of the defendant, ordered the municipality to pay defendant's costs, though the municipality as such

were no parties to the record. On review, the order as to costs set aside with costs. (*Berkly East Municipality v. Jatho*, 5 Juta, 57, followed).

Van der Merwe v. Van der Merwe's Executor. (Aug. 2).—The plaintiff after a lapse of fifteen years sued the defendant for the amount of his inheritance, alleging that the signatures to the power of attorney and receipts filed with the account were forgeries. The evidence failed to substantiate the allegations, and plaintiff withdrew the action. Costs as between attorney and client were given against plaintiff.

Weise's Trustee's v. Weise's Executor. (Aug. .).—The plaintiffs sought to set aside a will twenty-one years after it was made on the ground that it was informally executed. One of the witnesses, an old schoolmaster, deposed that he had drawn up the will in question, as well as many others in the district, and that he had signed the will, as was his habit, as a witness before it had been signed by the testator. The other witness to the will, as well as others present on the occasion, deposed to the proper execution by the testator before either witness had signed. The will was sustained. Where a will is otherwise a good will, the tendency of the Court would be to uphold the testament, and the onus would be on the party seeking to set aside such a will on a mere informality clearly to prove the informality.

Queen v. Marthinus. (Aug. 9).—An untried prisoner in gaol awaiting trial is not punishable under Act No. 5, 1866-67, which applies only to prisoners undergoing sentence of hard labour.

Wichura and others v. Powrie, Chairman of Claremont Municipality. (Aug. 9).—The bye-laws of the municipality required all motions to be in writing, and signed by the proposer and seconder. A motion for the reduction of the secretary's salary was proposed by one of applicants and seconded by another. The motion was put into writing, and signed by the mover only. The absence of the seconder's signature was not noticed, and the motion was put and carried by a majority, against the wishes of respondent. At the next meeting of the municipality the respondent as chairman ruled the motion out of order, as not having been signed by the seconder, and ordered the motion to be expunged from the minutes. The respondent held to have acted illegally, and ordered to pay the costs personally of the application, to restore the resolution on the ground that he had abused his position as chairman.

Queen v. Strautsman. (Aug. 9).—The defendant, a "bij-wooner," was convicted by a magistrate of theft in removing a door and window-frame from a building put up by him on a farm. The conviction was quashed, for though the defendant had no title to the property, yet he had removed it *bona fide* in the exercise of a supposed right of ownership.

Anderson & Murison v. Druscovitch. (Aug. 13).—The sum of £200 which had been tendered by defendant, held sufficient remuneration to the owners and crew of two tugs, by which defendant's vessel while on fire had been towed out of the docks into the bay and water pumped into the hold to extinguish the fire; the value of the property saved thereby being estimated at between £6,000 and £7,000.

Joel v. Dolman. (Aug. 17-20).—An exchange of shares, represented in the broker's notes as cross-sales, was agreed to, to be carried into effect about 20th April. The plaintiff resided in Kimberley and the defendant in Capetown. It was agreed that plaintiff should deliver scrip in the De Beer's Consolidated Mines Ltd., which scrip was not, at the time of contract, ready for issue but was expected to be ready about the 20th April. By special exertions the plaintiff on the 23rd obtained the first of the scrip issued, which he at once forwarded to Capetown. Defendant was advised of the arrival of the scrip on the 26th. On the 27th defendant objected to an irregularity in the endorsement on the scrip for 6 shares out of 330 sold. Plaintiff being advised by telegram of this, sent off at

once other scrip for the six shares, properly endorsed. These were tendered on Monday, the 30th April, when defendant refused to complete the transaction on the ground that the tender was then too late. Shares had meanwhile fallen in price. The defendant was held bound by his contract.

Phillips and others v. Kimberley Central Diamond Mining Co. (Aug. 20).—The deed of association of the Central Company, which was established for the purpose of diamond mining in the Kimberley Mine, made provision for the amalgamation of the Company with any other Company established for the same or similar purposes. A majority of about two-thirds of the shareholders ratified a provisional agreement entered into by the directors for amalgamation with the De Beer's Consolidated Mines, Ltd., the trust deed of which latter company authorised mining of every kind in any part of the world, the carrying on of any business anywhere, the acquiring of harbours, canals, and territory anywhere, and other very extensive powers. The applicants, who objected to the amalgamation, sought an interdict restraining the directors from carrying out the proposal. The Court on motion granted the interdict prayed, pending an action to be brought by applicants to have the same made perpetual.

De Beer's Mining Company v. Colonial Government. (Aug. 21-24).—Act No. 19, 1883, limits the maximum to be paid for transfer duty and stamps on each claim in diamond mines to £50, whether the same be held under quit-rent title from Government or under leases from owners of private property.

Urtel v. Urtel. (Aug. 22).—In an action for divorce on the ground of adultery, the guilty party is liable to have declared forfeited every benefit which he or she may have acquired from the marriage. In this case, where the wife had committed adultery, but the husband had been guilty of cruelty and ill-treatment, the Court refused to declare a forfeiture, though condemning the defendant's wife to pay the costs.

Shaw v. Stanton. (Aug. 23).—The plaintiff, whose estate had recently been sequestrated as insolvent, was arrested in Capetown on a charge of fraud connected with his dealings with his creditors at Grahamstown. A preliminary examination was held, and the case was afterwards remitted to the Magistrate's Court for trial for fraudulent insolvency. At the hearing plaintiff was acquitted. He thereupon instituted proceedings in the Supreme Court against defendant, the creditor who had set the criminal law in motion. Defendant applied to have the trial removed to Grahamstown, where all his witnesses resided, alleging that as plaintiff was without means, he would in any event have to pay his own costs. Plaintiff opposed, stating he had some witnesses who were in Capetown. The Court ordered the removal, unless the plaintiff found security for £30 towards the cost of plaintiff's witnesses.

Stransky v. Jansen & Co. (Aug. 23).—Plaintiff, residing at Kimberley, and defendants at Capetown were brokers. Defendants telegraphed to plaintiff on the morning of the 28th May, in reply to a request for orders to buy certain shares at a certain price, "wire sharp." No reply being received, in the afternoon defendants again telegraphed cancelling the order. Meanwhile plaintiff had bought the shares, and according to usual custom, made himself responsible for the transaction, and then telegraphed the fact to defendants. There was some delay in transmission, in consequence of which defendants did not receive the telegram till some hours after they had despatched their countermand of the order. Defendants refused to confirm the transaction. *Held*, defendants were bound.

London & S.A. Exploration Co. v. Bultfontein Mining Board. (Aug. 24-29).—The plaintiffs were owners of a farm, the title of which contained no reservation of precious stones to the Crown, upon which farm a diamond mine had been established. The plaintiffs issued to the miners leases for five years, renewable at will. One G, a miner, agreed to take a lease for five years, but did not actually do so. During the currency of the term, in 1883, G abandoned his

claim and gave up the lease. His name, however, remained on the registry of mines as lessee. In August, 1886, at the expiration of the five years, plaintiff gave notice to the Registrar that the lease had expired and had not been renewed, and that the claims in question had been removed from land set aside for mining purposes. In September, 1887, at the request of defendants' officials, G gave formal notice to the Registrar of Mines of abandonment of his claims as from August, 1886. The defendants thereupon, after notice to plaintiffs, registered the claims in their own name as abandoned claims under the provisions of Act No. 19, 1883. Plaintiffs brought their action to cancel this registration and to eject defendants. *Held*, that plaintiffs were entitled to succeed, as G was not in 1887 the "registered and rightful owner" of the claims, entitled as such lawfully to abandon them within the terms of the 65th section of the Act.

Queen v. Castleden. (Aug. 27).—The accused agreed to pledge a piano for the security of an advance made to him by one T, the piano, however, remaining with accused. Some time after the accused sold and delivered the piano to H. *Held*, that the accused was not indictable for defrauding T, as there had been no concealment or dissimulation practised upon him so as to constitute the *crimen stellionatus*.

Incorporated Law Society v. Ashley. (Aug. 27).—An attorney obtained by false pretences an order from a convict for the delivery of certain stock. No stock, however, were found or delivered. The attorney was suspended from practice for twelve months.

S. A. Loan and Mercantile Agency v. Cape of Good Hope Bank. (Aug. 29, Sept. 12).—An hypothecation of claims in a diamond mine, duly registered at the Registry of Mines under the Griqualand West Mining Ordinance No. 10, 1874, and Proclamation No. 8 of 1880, held still to be binding, notwithstanding that the claimholder had subsequently obtained a quit-rent title for his claims under Griqualand West Ordinance No. 6, 1880, and that there had not been a fresh hypothecation executed before the Registrar of Deeds. The 8th section of Act No. 38 of 1884 does not alter the substantive law as to undue preference, but merely facilitates the proof of the insolvent's contemplation of sequestration, which still remains a question of fact to which an answer must be found in the evidence and in such reasonable inferences as may be drawn from the evidence.

Ludolph and others v. Wegner and others. (Aug. 27-Sept. 12).—
 (1.) A right to discharge surface water upon a neighbour's land may exist by virtue of a duly created servitude, or by virtue of the natural situation of the locality.
 (2.) If it be difficult from the nature of the surface to ascertain what is the natural channel, then the course in which the water has immemorially flowed will be considered as having had a natural and legitimate origin.
 (3.) Where water has flowed in an artificial channel for thirty years or more, it may be presumed, in the absence of evidence to the contrary, to have flowed thus immemorially.
 (4.) When once the right to discharge water into such a channel has been established, the person entitled to the right may increase the ordinary flow to the prejudice of the lower proprietor, if such increase be occasioned in the ordinary course of draining, ploughing, or irrigating the upper land, and be not greater than is reasonable under the circumstances. If the channel becomes choked through neglect, he may compel the lower proprietor to clean it himself, or to allow him to do so.

Hall's Trustee v. Hall. (Aug. 31).—After the sequestration of his estate, and before the filing by the trustee of the liquidation and distribution account, the insolvent earned as a commission for his personal services in effecting the sale of certain claims in the Kimberley mine, 500 diamond-mining shares. The trustee had the shares attached, and claimed that the insolvent had no right to retain them, as he could not acquire property at that time as against his trustee. *Held*, that the insolvent was protected by the 49th section of the Insolvent Ordinance, the property having been acquired as hire, wages, or reward for personal services (this was not an application under the 127th section of the Ordinance for the attachment of property for a deficiency in the estate).

HIGH COURT OF GRIQUALAND.

L. & S. A. Exploration Co., Ltd. v. Bultfontein Mining Board.—*Abandonment of Claims.*—*Mining Board.*—*Act 19, 1883.* (May 22, June 15).—G was a registered claimholder in a diamond mine, where there was no reservation of minerals or precious stones in favour of the Crown. He agreed with E, the owner of the soil, to take a lease of his claims for five years, with the right to renew, but did not actually take out a lease, and his rent fell into arrear before the expiration of the term. Two years after the term had expired, and the lease not having been renewed, he sent the Mining Board notice of his intention to abandon the claims, which were still registered in his name, and the Board, on E declining to undertake the liabilities of a claimholder in respect thereof, procured their registration into its own name, and took possession of them. E brought an action against the Board, claiming cancellation of this registration and an order on the Board to quit possession. *Held*, that the claims had been legally abandoned under Act 19 of 1883, and that the Board was therefore entitled, under the provisions of that Act, to maintain its possession thereof.—*Leonard, Q.C.*, and *Frames* for the plaintiff Company.—*Hopley, C.P.*, and *Lange* for the defendant Board.—Attorneys: *Caldecott & Phear*; *D. J. Haarhoff*. [This judgment was reversed on appeal by the Supreme Court on August 29].

Queen v. Beddome.—*Game Licence.*—*Market-master.*—*Plea of Guilty.*—*Act 36, 1886, § 4.* (July 18).—B, a market-master, pleaded guilty to contravening § 4 of Act 36 of 1886, by selling game without a licence, and was convicted of that offence. It appeared that the owner of the game, on whose behalf B sold, held a licence under the Act. *Held*, that the owner was the seller and B merely acted as his agent, and as the evidence negatived the commission of the alleged offence, notwithstanding the plea the conviction must be quashed.—*Feltham* for the appellant.—*Lange* for the Crown.—Attorneys: *Caldecott & Bell*.

Queen v. Plockey.—*Indictment.*—*Stamp Acts.*—*Broker.* (July 18, 26).—A person carrying on the business of a broker without the licence required by the Tariff contained in the Schedule to Act 20 of 1884 is liable to prosecution under § 6 of Act 13 of 1870. P was convicted of broking without a licence. The only evidence was that he had in one case sold, and in another received for sale, certain ostrich feathers on commission. *Held*, on review, that the Crown had failed to prove that P exercised the trade or calling of a broker, as defined by § 3 of Act 38 of 1887, and the conviction must therefore be quashed.—*Joubert* for the accused.—*Lange* for the Crown.

Beaconsfield Municipality v. Evans.—*Bye-law.*—*Penalty.*—*Act 46, 1882, §§ 109, 175.* (July 26, 31).—Where a municipal bye-law provided that "the penalty shall be a fine of £10 for each offence or imprisonment for a period of three months:" *Held*, that it was within the discretion of the Court to impose a lower penalty than that specified. *Semble*, in the absence of such discretion the bye-law would have been unreasonable and therefore void.—*Joubert* for the accused.—*Lange* for the Crown.

Barnato Bros. v. Munro.—*Contract to exchange shares.*—*Delivery.*—*Reasonable time.*—*Rescission.* (August 2).—M employed a broker to exchange certain shares which he owned for shares in another company. The broker made a contract for this purpose with B by which M agreed to deliver his shares to B "on or about April 20" and receive the other shares from B in exchange. It was subsequently agreed that the exchange should be effected on April 23. On the morning of that day the broker called at B's office with M's shares, and was requested and agreed to call again to effect the exchange in the afternoon, but omitted to do so. On the following morning M repudiated the contract. *Held*, that B was entitled to maintain an action for its breach.—*Lange* for the plaintiffs.—*Guerin* for the defendant. Attorneys: *Caldecott & Bell*; *D. J. Haarhoff*.

Harvey and another v. Martin.—*Deed of sale.*—*Suspensive condition.*—*Dominium.* (August 7, 8).—Where an engine was sold and delivered by A to B on the conditions that it should be paid for by instalments, and that until the last instalment was paid it should remain and be deemed the property of A, and if the instalments were not punctually paid it should revert to A, and all payments made on account of the purchase price should in that event be regarded as payments made on account of rent or hire: *Held*, that this was a sale with a suspensive condition and that, B having failed to pay all the instalments, the property remained in A.—*Frames for the plaintiffs.*—*Lange for the defendant.*—*Attorneys: Caldecott & Bell; D. J. Haarhoff.*

L. & S. A. Exploration Co. v. Haybittel.—*Messenger of R. M. Court.*—*Execution of writ.*—*Negligence.*—*Ord. 37, 1828, § 8.*—*Act 20, 1856, § 53 and Sched. B. § 58.* (August 7, 20).—In an action against the Messenger of a Magistrate's Court for damages sustained owing to his negligence in executing a certain writ: *Held*, that there was some evidence of negligence on the part of the defendant, but that, as it did not appear that the plaintiffs had sustained any damages thereby, the action must fail. Where property which the Messenger was about to attach was claimed by a third party, and he thereupon reported the claim to the plaintiffs' attorney, and applied for an indemnity which was not given: *Held*, that in the circumstances of the case he was justified in not proceeding with the attachment.—*Frames for the plaintiffs.*—*Guerin for the defendant.*—*Attorneys: Caldecott & Phear; Coghlan & Coghlan.*

Geddes v. Kaiser Wilhelm Gold Mining Company.—*Joint-stock company.*—*Prospectus.*—*Misrepresentation.*—*Rescission of contract.* (August 8).—Where a plaintiff had applied for shares in a mining company on the faith of a prospectus, which announced that the company was "to be incorporated with limited liability," and about eighteen months afterwards brought an action for the rescission of his contract to take shares on the ground that the company had not been so incorporated, and it appeared that the delay in registration under the Companies' Act had arisen through accidental circumstances, for which the company was not to blame, and of which the plaintiff was or might have been aware, and the company had in fact been registered before the action was tried: *Held*, that the plaintiff was not entitled to be relieved from his contract.—*Guerin for the plaintiff.*—*Lange for the defendants.*—*Attorneys: Playford; Knights & Hearle.*

Dall v. Registrar of Deeds.—*Ante-nuptial Contract.*—*Registration.*—*Act 21, 1875.*—*Ord. 11, 1872, G.W.* (August 9).—Where an ante-nuptial contract had been tendered for registration to the Registrar of Deeds at Kimberley within twenty-eight days of execution, but the registration had not been effected owing to a clerical error on the part of the notary, the Court directed registration of the contract, reserving the rights of any creditors who might have become such previous to registration.—*Guerin for the petitioner.*—*Attorney: Schermbrucker.*

Haupt v. Diebel Brothers.—*Master and Servant.*—*Wrongful dismissal.*—*Justification.*—*Measure of damages.* (August 9, 10).—H sued D, a tradesman by whom he had been employed, for wrongful dismissal. D justified on the ground that H had assaulted a fellow-servant and created a disturbance on his business premises. *Held*, on the facts, that the assault, which was to some extent provoked, and the consequent disturbance, which was not proved to have in any way injured D in his business, did not afford sufficient justification for summary dismissal, and that H was therefore entitled to damages equivalent to a month's salary in lieu of notice. Where the period over which the contract of service extended was still unexpired when the action for wrongful dismissal was tried, the Court gave as damages the amount of unpaid salary for the whole period in the absence of any evidence that the plaintiff could or was likely to obtain other employment for any portion of the period in question.—*Frames for the plaintiff.*—*Guerin for the defendants.*—*Attorneys: Graham, Vigne & Mallett; D. J. Haarhoff.*

Becker v. Duarte.—*Magistrate's Judgment.*—*Attachment of immovable property.*—*Rule of Court 36.* (August 10.)—Where it is sought to obtain an order for the attachment of the immovable property of a defendant against whom the plaintiff has obtained judgment in the Magistrate's Court, and the Messenger has made a return of *nulla bona*, it is necessary first to obtain provisional sentence on the judgment of the Magistrate's Court.—*Guerin* for the applicant.—*Joubert* for the respondent.—Attorneys: *Badnall; De Kock.*

Smith and Warren v. Harris.—*Contract of sale.*—*Measure of damages.*—*Specific performance.*—*Exception.* (August 20, Sept. 10.)—In an action for the price of certain shares purchased by the defendant, and of which the plaintiff tendered delivery, the defendant admitted the breach of contract and pleaded a tender of the difference between the contract price and the price at the time of the breach: *Held*, on exception, that the plea was bad and that the vendor was entitled to claim the purchase price in full against delivery of the shares.—*Frames* for the plaintiffs.—*Lange* for the defendant.—Attorneys: *Caldecott & Phear; Coghlan & Coghlan.*

Mitchell & Co. v. Purdey.—*Provisional sentence.*—*Jurisdiction.*—*Practice.*—*Pactum de non petendo.* (September 10.)—M & Co sued P in the Magistrate's Court on a dishonoured cheque. P pleaded an agreement to give time for payment made with M, an absent member of the plaintiff firm. After the pleadings had closed, the Magistrate postponed the hearing in order to obtain the evidence of M. The plaintiffs then, without notice to the defendant, withdrew the case and applied to the High Court for provisional sentence. P objected that the Court had no jurisdiction, the plaintiff having elected another forum where issue had been joined, and also raised the same defence as in the Magistrate's Court. The Court, without ruling on the preliminary objection, held that the defendant's allegations in the absence of contradiction by M were sufficient to justify the refusal of provisional sentence, but by consent of parties granted final judgment for the amount claimed, execution to be stayed till the expiration of the period for which the defendant pleaded that time had been given.—*Guerin* for the plaintiffs.—*Joubert* for the defendant.—Attorneys: *Playford & Fitzpatrick; Schermbrucker.*

HIGH COURT, ORANGE FREE STATE.

Re Wicks. (September 1).—Applicant applied for the sequestration of his estate, his assets being £30 and liabilities £89. Prenalau & Co., his chief creditors, had already taken out a writ. The Court ordered the application to stand over until after the sale in execution, as the sequestration would swallow up the estate and prejudice the creditors.

Howard v. The State.—Appellant was charged before the Landdrost Court of Jacobsdal with breach of the peace. He objected to the Landdrost trying him on the ground of personal enmity. The Landdrost dismissed the objection, holding that a reconciliation had taken place, and there was no longer any ill-will on his side, and after trial found the appellant guilty and sentenced him. *Held*, that as the objection was *bond fide*, and apparently based on reasonable grounds, the Landdrost could not decide on it, but should have declined to hear the case. Conviction quashed (Voet 5, 1, 47; Groen. ad. Leg. Abr., 3, 1, 16; *Philips v. Hanan & Hoffa*, 2 Roscoe, 1, cited). *Bier, State-Attorney.*

Baily v. Benfield. (September 8).—By Art. 114, Ordinance 1, 1887, an attorney is not allowed to charge when conducting his own case as party in a cause. X, an attorney defendant, engaged Z as his attorney, and was employed by the latter to do the copying work at the price usually paid to "copyists." *Held*, that this did not fall under the prohibition.—*Fischer, Steyn.*

In re Webster.—*Steyn* applied for the sequestration of this estate. The assets were £47, and the liabilities £169, and applicant was earning £5 per week as a miner. *Bier* opposed on behalf of creditors, and said his clients were prepared to accept £4 monthly in reduction of their claim. Application refused with costs, leave being given to applicant to apply again if unduly pressed.

Benningfield v. The State.—Under Ord. 1, 1885, Arabs, Chinese &c., are not allowed to hire fixed property in towns without leave of the executive. Certain coolies had applied for, and been refused, leave to hire certain premises, and thereafter opened businesses on the premises ostensibly for the appellant, but as was alleged on their own account, the appellant only furnishing his name and hiring the buildings to evade the law. *Held*, that the Landdrost had no jurisdiction to interdict the business. *Steyn, State-Attorney.*

Jan v. The State.—Ord. 1 of 1873 (Master and Servants), only requires a verbal contract of service for a year to be entered into in the presence of two witnesses, but the contract can be judicially proved by any competent evidence. *Bier, State-Attorney.*

Bernadie and Bernadie, applied to obtain consent of Court to a deed of voluntary separation in *mensa et thoro*. *Held*, that the Court will not give an order unless adequate cause be shown for the separation (Van der Linden, Dutch ed., p. 32).—*Fischer.*

Paffett & Kerr v. Graves Bros.—*Held*, per GREGOROWSKI, J., that an I.O.U. bearing two dates on the face of it, must be stamped as a promissory note.—*Fischer.*

NEW RULES OF COURT.

The following new Rules of Court appeared in the *Government Gazette* of the 25th September, 1888:—

*In the Supreme Court of the Colony
of the Cape of Good Hope.*

IT IS ORDERED,—

That Rules of Court 345, 346, 347 and 358, and 354 in so far as it applies (*sic*) to the High Court of Griqualand, are hereby repealed, and the following Rules are substituted in lieu thereof:

Civil Terms of High Court of Griqualand.—381. There shall, for the despatch of the civil business of the High Court of Griqualand, be four terms in each year, in the place of five terms as heretofore, which shall commence and end respectively as follows: The first term on the 15th day of February and the 14th day of March; the second term on the 15th day of May and the 14th day of June; the third term on the 15th day of August and the 14th day of September; the fourth term on the 15th day of November and the 14th day of December.

When it shall happen that any of the days appointed for the commencement of term shall be a Sunday or a public holiday, the

term shall commence on the Monday or day following; and when any day appointed for the termination of term shall be a Sunday or a public holiday, the term shall end on the Saturday or the day preceding.

Criminal Sessions of the High Court of Griqualand.—382. There shall, for the despatch of the criminal business of the aforesaid High Court, be four sessions in every year, in the place of five sessions as heretofore, which shall commence respectively on the 5th day of February, the 5th day of May, the 5th day of August, and the 5th day of November in every year, to be continued by adjournment as the case may require: Provided that whenever any of the said days shall be a Sunday or public holiday, the session shall commence on the Monday or the day following, not being such.

Vacation.—383. Each of the periods not included in the terms of the High Court of Griqualand shall be deemed to be a vacation of such Court in terms of the provisions of Act No. 23 of 1875, during which one Judge shall be competent to execute all and every the powers, jurisdictions and authorities vested in the said Court.

Sittings in Vacation.—384. The aforesaid High Court will also sit in vacation for so many days as may be necessary for the despatch of any business which the Court shall see cause to appoint to be heard and determined out of term.

Provisional Days in Vacation.—385. For the hearing of provisional cases and motions, the aforesaid High Court shall sit on the following days in each year, viz.: On the 15th day of January, the 15th day of April, the 15th day of July, and the 15th day of October, or if any of the said days shall be a Sunday or public holiday, then on the next succeeding day not being such.

Date of taking effect.—386. These rules shall commence and take effect from the 1st day of January, 1889.

By order of the Court,

(Sd.) J. C. B. SERRURIER,

Registrar.

TO CORRESPONDENTS.

LAW CLERK.—The points you raise are all answered in the case of *Barry v. Miller* (1 Roscoe, 61); see also § 104 of Ord. 6 of 1843. B could not have a warrant issued against A for trespass.

—EDITOR.

CORRESPONDENCE.

ARRESTS.

SIR,—On reading the chapter on Arrests in the June issue of the *Law Journal*, three questions suggested themselves to my mind which may be worth while bringing to the notice of the writer of the valuable series of papers on the Theory of the Judicial Practice:—

1. On page 111 the author says, "If however, no security is given by the defendant, then the plaintiff must wait till the return day of the writ, when he should move the Court for its confirmation." Quite so; but supposing that no security is given, and that the plaintiff neglects to move the Court on the return day of the writ for its confirmation, what is the legal position of the arrested person then? Is he by the neglect of the plaintiff entitled to walk out of prison on the return day, or must he remain in gaol indefinitely? If the former, is he subject to re-arrest as before? What penalty, if any, is the plaintiff liable to for his negligence?

2. On page 112, the writer says that upon judgment being given against the defendant he is entitled to his discharge, and that if he meditate flight before a decree of civil imprisonment can be obtained against him he can be again arrested, "not under the 8th Rule of Court, but only by an order of the Court or Judge." Now I should like some authority for this statement of the law. It has been the custom of most of the practitioners in the High Court of Griqualand on the return day of the writ to be prepared with a second writ of arrest, and if the defendant confesses the debt, and judgment be given against him, as often happens, then immediately on his leaving the Court to cause him to be re-arrested under Rule 8. This is a procedure I have personally often seen adopted, and occasionally have indulged in it myself. Possibly it was, as we are now told, an illegal and improper indulgence; but I should like to know on what authority it is condemned.

3. On page 116 of the *Law Journal* we are told "if an arrest is void on the ground of any informality in any of the proceedings, and where the plaintiff might begin *de novo*, he is not liable for anything else beyond the defendant's costs in upsetting the proceedings." The case of *Pullinger v. Harsant*, reported 1 C. Law Journal,

p. 111, and in 2 High Court Reports, p. 111, seems to be a very distinct authority to the contrary on this question; and in the course of a lengthy and learned judgment, Mr. Justice LAURENCE said "there is an imprisonment which as soon as the writ is set aside becomes a trespass, for which the party arrested is entitled to damages. I have arrived at this conclusion with considerable reluctance, not only because of the special circumstances of the case, but also because it makes everyone who takes out a writ under the 8th Rule, which is subsequently set aside, as frequently happens, for some technical omission or irregularity, liable in damages. The law, however, seems clear."

There is also the case of *Whittle v. Campbell* tried in the Supreme Court in December, 1883, which formed the subject of an article in 1 C. Law Journal, p. 78, and which seems another strong authority against the above-quoted *dictum* of the learned writer of the interesting and valuable articles on the Theory of the Judicial Practice. Possibly Mr. Van Zyl is right, but I hope that in some future number he will not fail to support his statement of the law on this question, with a reference to the legal authorities on which that statement is based. The authorities quoted in the judgments in the case of *Pullinger v. Harsant* are all English authorities, and it may be that the Roman-Dutch authorities are against the view taken by the Judges in that case.

AN ATTORNEY.

CONTENTS OF EXCHANGES.

The Law Quarterly Review. Vol. IV. No. 15. For July, 1888.
London: Stevens & Sons.

A note on the Factors Acts (A. Cohen, Q.C.)—The Local Government Bill (P. C. Montague)—Public Meetings and Public Order: V. The United States (Hon. E. H. Bennett)—Early English Land Tenures: I. Mr. Vinogradoff's Work (Maxime Kovalevsky); II. Domesday Studies (C. I. Elton, Q.C., M.P.)—The Beatitude of Seisin. II. (F. W. Maitland)—Railway Mortgages and Receiver's Debts in the United States (A. Gullup)—On Licensing of Nuisances (T. Crisp Poole)—The Law of Escheat (F. W. Hardman)—English Authors and American Copyright (T. E. Scrutton)—Reviews and Notices—Notes—Contents of Exchanges.

The Journal of Jurisprudence and Scottish Law Magazine. Vol. XXXII.

Nos. 377-379. For May, June and July, 1888. Edinburgh: T. & T. Clark.

No. 377.—The Philosophical School of Law (Professor Bluntschli)—The Story of the Chair of Public Law in the University of Edinburgh (Professor Lorimer)—The House of Lords—Commerce and Contracts (Professor Diodato Liroy)—The Trial of Mr. Middleton—Presumption of Life under the Act of 1881—Civil Procedure in the Courts of New York—Reviews—The Month—Notes of Cases.

No. 378.—Industry and Property (Professor Diodato Liroy)—The State and Industry: Sir John Lubbock's Bill and Mr. Watt's motion in Parliament—The Royal Commission on Loss of Life at Sea. Part I.—The Pawnbrokers' Act—Laws relating to Sunday—Obituary—Reviews—The Month—Notes of Cases.

No. 379.—The Valuation Acts. I.—The Royal Commission on Loss of Life at Sea. Part II.—Compensation to Publicans—The Civil List—A Strange Recontre—The Month—Interviews with Clients—Notes of Cases.

The Natal Law Reports. Vol. IX., Parts 2 and 3. For March and May, 1888. Maritzburg, Natal: Horne Brothers (For the Natal Law Society.)

Reports of Cases in the Supreme Court of Natal.

The Canadian Law Times. Vol. VIII. Nos. 6, 7, 8, 10, 11 and 12.

For April, May, June, July and August, 1888. Toronto: Carswell & Co.

No. 6.—The Contracts and Rights of Foreign Corporations (E. E. Kittson)—Editorial Review: The Proposed Faculty of Law; The York Law Association; The Library of Osgoode Hall; The Consolidated Rules; Judicial Salaries—County of York Law Association—Review of Exchanges—Notes of Cases of the Supreme Court of Canada; High Court of Justice, Ontario; Supreme Court, New Brunswick; Queen's Bench, Manitoba.

No. 7.—Notes of Cases in the Courts of Ontario and New Brunswick.

No. 8.—Have the Provincial Legislatures power to appoint Police Magistrates? (A. H. Marsh)—Editorial Review: Foreclosure and Creditors' Relief Act; The Testimony of Parties; Chief Justice Waite—Hamilton Law Association—Reviews of Exchanges—Notes of Cases in the Courts of Canada and Ontario.

No. 10.—Ancillary Grants of Probate and Letters of Administration (Alfred Howell)—Pagan Marriages—Editorial Review: The Proposed Law School; Fiat Justitia ruat cælum; The Middlesex Grand Jury; Chief Justice Galt—Book Reviews—Correspondence—Review of Exchanges—Notes of Cases in the Courts of Canada, Ontario, New Brunswick, and Manitoba.

No. 11.—The remedy against a preferred creditor—Editorial Review: The Rules of Practice—Book Reviews—Review of Exchanges

—Notes of Cases in the Supreme Court and High Court of Justice, Ontario, and Queen's Bench, Manitoba.

No. 12.—Wills of Married Women (J. Bicknell)—Ontario Legislation, 1888—Editorial Review: The Bar and the Public—Book Reviews—Review of Exchanges—Notes of Cases in Supreme Court and High Court of Justice, Ontario, and Supreme Court, North-West Territories.

The Canada Law Journal. Vol. XXIV. Nos. 7, 8, 11, 12 and 13. For April, May, June, July and August, 1888. Toronto: J. E. Bryant & Co.

No. 7.—Editorial: Shorter Editorials; A Problem in the English Law of Arbitration; Railway Commission; Comments on Current English Decisions—Reviews and Notices of Books—Notes on Exchanges and Legal Scrap Book—Early Notes of Canadian Cases—Law Students' Department, &c.

No. 8.—Editorial: Shorter Editorials; Libel and Slander; The Provincial Legislation of 1888—Reviews and Notices of Books—Notes on Exchanges, &c.—Correspondence—Proceedings of Law Societies—Reports—Early Notes of Canadian Cases—Law Students' Department, &c.

No. 11.—Editorial: Shorter Editorials; Progress of the Torrens System of Registration; The Value of Women; Comments on Current English Decisions—Reviews and Notices of Books—Notes of Exchanges, &c.—Reports—Early Notes of Canadian Cases—Law Students' Department.

No. 12.—Editorial: Shorter Editorials; Comments on current English Decisions—Contingent and Exorbitant Fees—Reviews and Notices of Books—Notes on Exchanges—Correspondence—Notes of Canadian Cases.

No. 13.—Editorial: The Consolidated Rules—Reviews and Notices of Books—Proceedings of Law Societies—Notes of Canadian Cases—Law Student's Department—Miscellaneous.

Themis. Vol. XLIX. No. 3. For July, 1888. The Hague: Belinfante Brothers.

(1.) Law of the Netherlands. Civil Law and Procedure: Has the death or release of a guardian the effect of the superintending guardian losing his office. Answered in the negative (N. F. van Nooten): A question concerning the prosecution of the suit after judgment, whereby a hearing of witnesses is ordered, is confirmed on appeal (N. F. van Nooten, from the writings of the late D. Leon).

2. Roman Law. The Foreigner at Rome (J. C. Naber).

3. General Jurisprudence. The subject of law on "Paper Currency" reviewed in the "Journal for assimilating the knowledge of law" (J. G. Kist)—Execution of foreign judgments (W. T. C. van Doorn)—On the subject of Life Insurance, (F. A. Eggers)—

Comments on Investment of Capital and securing of Interest (M. T. Goudsmit).

4. Reviews.

5. Academical Literature. Contribution to the History of the laws regarding Import and Export in the Province of Groningen, 1795-1802 (K. Meijer Wiersma).

6. Notices and Contributions.

NOTES.

"EXCLUSIVE Dealing (see Boycotting)" is a criminal offence in Ireland but legitimate business in the China seas. Such probably will be the general impression derived from the highly deliberate judgment of Lord COLERIDGE in the great case of the *Mogul Steamship Co., Ltd. v. McGregor, Gou and Co. and others*—we say highly deliberate, for the arguments were concluded on the 4th of February and judgment was delivered on the 11th of August. The defendants in this case were certain lines of steamers, trading with China, who formed what was called a "Conference," and agreed to give a certain rebate on the regular charges for freight to shippers who undertook to send all their shipments by "Conference" steamers. The Mogul Company, who were excluded from the Conference, complained that they were the victims of a boycotting conspiracy and brought their action for damages and an injunction. What Lord COLERIDGE laid down in effect was that every combination of which the object was to injure a third party was an indictable offence and also, provided damage was actually caused, an actionable tort; but that if the immediate or primary object of the combining parties was not to injure others but to benefit themselves, even though such injury too there was an obvious and inevitable effect of the combination, the combination was lawful. The case before him, he held, after "much trouble and much doubt," to come within this category, and accordingly gave judgment for the defendants. "It must be remembered," said his Lordship, "that all trade was and must be in a sense selfish; trade being limited—nay, the trade of a particular place or port being limited—what one man gains another loses. In the hand-to-hand war of commerce, as in the conflicts of public life,

whether at the bar, in parliament, medicine, or engineering, men fight on without much thought of others, except a desire to excel and defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sidneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is difficult to draw, but he could not say that it had been passed by defendants—viz., the line which separates the reasonable and legitimate selfishness of traders from wrong and malice." The case is obviously one of great importance to the commercial world, and the last word on it will probably have to be said by the House of Lords.

It is now just sixty years since the Supreme Court of the Cape Colony was constituted, the first Judges being WYLDE, C.J. and MENZIES, BURTON and KEKEWICH, JJJ. The announcement in the obituary column of *The Times* of the death, at his residence in London, on the 6th of August, of one of these gentlemen, Sir WILLIAM WESTBROOKE BURTON, at the patriarchal age of 94, will seem to readers at the Cape like an echo from the past. The career of the deceased Judge was not only exceptionally prolonged but included an unusual number of varied experiences. Like the late Lord CHELMSFORD, who before being called to the bar was present as a midshipman at the battle of Copenhagen, Sir WILLIAM BURTON originally chose the navy as his profession and is said to have been wounded in the Mediterranean in 1811, and to have been present at the attack on New Orleans in 1815—the year of Waterloo. Nine years later he was called to the bar, and in 1826 was appointed Recorder of Daventry, a small country town in Northamptonshire where his father, Mr. Edmund Burton, resided. In 1828, as already stated, he became one of the original members of the Supreme Court of this Colony. Mr. Justice COLE, in his entertaining "Reminiscences of the Cape Bench and Bar," published in the February number of this *Journal*, referred to Mr. Justice BURTON as dead, possibly relying on a statement to the same effect in "Tennant's Rules of Court." After thus prema-

turally killing his judicial predecessor, he states, as a proof of the conscientious spirit in which he entered upon his new duties, that, on receiving the Cape appointment, Mr. BURTON went to Holland for six months for the purpose of studying the Dutch language—a curious proof that consideration in the law courts for the vernacular is by no means an exclusively recent phenomenon. After having an opportunity extending over six years of testing his proficiency in the *taal*, Mr. Justice BURTON was transferred in 1833 to the Supreme Court of New South Wales and his connection with the Cape thus terminated, more than half a century ago, but we believe that some members of his family still reside in the Colony. In 1844 he was created a Knight of the Bath and was once more transferred, this time to Madras, where he remained till 1857. In 1858 he returned to Sydney and was appointed President of the Legislative Council of New South Wales, which appointment he held until 1862. From this brief and dry record of his career it will be apparent that Sir WILLIAM BURTON was among the number of those who saw the cities of many men and knew their minds. Had he followed the modern fashion and published a volume of reminiscences, they could have scarcely failed to prove interesting reading; as it is, his name will be remembered by a more limited circle of legal students for his “Decisions in Insolvency,” a commentary on the old “Ordinance 64,” which subsequent legislation has necessarily rendered to a great extent obsolete.

THE decision of the Supreme Court in the case of the *London and South African Co., Limited v. The Bultfontein Mining Board* is far from giving satisfaction. It was an appeal from the unanimous judgment of the three Judges of the High Court of Griqualand upon a question as to the ownership of claims in a diamond mine. The High Court Judges each gave an exhaustive and elaborate judgment in favour of the Mining Board. The L. & S.A.E. Co. then appealed to the Supreme Court—a Court also consisting of three Judges—when the judgment was virtually reversed with costs. Had the appeal been heard by four or five Judges, no doubt less dissatisfaction would have existed, but for a judgment of three Judges to be reversed by another Court of three Judges naturally calls for comment. We have no desire to discuss the merits of the

Judges of the two Courts, but we do venture to say, without any wish to draw invidious distinctions, that the Judges constituting the High Court of Griqualand enjoy the confidence of those over whom they have jurisdiction, and one would naturally suppose that, being obliged by constant contact with the subject to make the laws regarding mines and minerals in Griqualand West a special study, they would be able to form a correct judgment upon the issues raised in a case of this description. The possibility of a reversal might have been foreseen and in view of that contingency we submit the appeal should not have been heard without the aid of one or two other Judges being summoned to the assistance of the Supreme Court. Such a course, if adopted, would probably have stifled unfavourable comment and have avoided the cost and delay of an appeal to the Privy Council for which leave has since been granted.

IN giving judgment in the above case the Chief Justice is reported have said: "In support of this view, Mr. Justice SOLOMON relies to a great extent upon Proclamation 71 of 1871, but that proclamation does not, as I read it, support his view and even if it did it has been wholly repealed by Act 19 of 1883." On re-perusal of the judgment in the Court below we find Mr. Justice SOLOMON, when treating of the Proclamation 71 of 1871, does so purely from an historical point of view, with the object of tracing the legislation upon the point in issue. He states in the clearest manner possible that the Proclamation 71 of 1871 was repealed by Act 19 of 1883 and then proceeds to discuss the object and meaning of that Act. We cannot think the Chief Justice meant that Mr. Justice SOLOMON had based his judgment in the Court below to a great extent upon a repealed proclamation, for the judgment is clearly to the contrary.

It may be as well to draw the attention of practitioners and others interested in the formation and registration of Limited Liability Companies in the Colony, to the fact that Sub-section 5, of Section 2, of Act No. 23, of 1861, clearly provides that a statement shall be made in or endorsed on the deed of settlement of every Company seeking registration, to the effect that ten per

centum on their shares has been paid up by shareholders in the Company holding shares in the aggregate of not less than three-fourths of the nominal capital of the Company. This acknowledgment in or endorsement on the Deed of settlement is in addition to and quite distinct from the statement to the same effect which should be made by separate declaration by the Directors of the Company.

We draw special attention to this requirement of the law because it is a fact, easy of verification, that very few of the Trust Deeds registered in the Colony have been so framed as to comply with this simple direction of the Statute Book.

THE whole law relating to the limitation of liability of joint stock companies requires amendment. As is pointed out in another part of this number of the *Law Journal*, the present colonial Act of 1861, was drawn upon the lines of the first English Limited Liability Act, which has long since been repealed and relegated to oblivion, and fresh Acts have been passed, considerably modifying and improving the law as it stood when our Act came into force. The Bill relating to joint stock companies passed last session is rather of the nature of an ill-digested addition to the Act of 1861 than of a proper amendment of the existing law. It is very desirable that some measure should be introduced as soon as possible more in accordance with the requirements of this company-mongering age than the Act now under consideration. The Attorney-General is reported to have said in the House of Assembly that the Government recognised the desirability of a complete change of the company law of the Colony, but that he thought it advisable to wait for the result of the legislation now going on in the House of Lords whereby certain alterations and improvements in the English Acts are likely to be made, so that we could have the benefit of the legislative wisdom of the mother country when framing the required Bill. We hope the next session of Parliament will see that a new and proper addition in this respect is made to the Colonial Statute Book.

AN important measure has been passed during the past session of Parliament providing for the recognition in this Colony

of letters of administration granted in other States. By the word "State" is meant England, Scotland, Ireland, all British Possessions, the Orange Free State, and Transvaal Republic; and the Act is only intended to come into force when the Governor shall have published a proclamation in the *Government Gazette* that a State has made reciprocal provision for the recognition of letters of administration granted in this Colony. Formerly it was the practice in such cases for the Master to issue letters of administration to a duly appointed agent, being a resident in the Colony, of say an English executor, who produced his power of attorney, together with certified copy of the will of the deceased, and probate issued in England, and gave security as in the case of an executor-dative. But it would have been difficult to lay one's finger upon the exact legal authority which authorised the issue of letters of administration in such circumstances. Now, however, the defect has been cured, and as soon as a State has made reciprocal provision, and has been proclaimed under the Act, a foreign executor may produce his letters of administration to the Master of the Supreme Court of this Colony, deposit a copy with him, and lodge at the same time the usual security and office fees, whereupon the Master will seal the letters with his seal of office, and they then become as binding and effective as though they had been originally granted in this Colony. It may be added that this will only apply to estates in which letters of administration have not already been granted by the Master of the Supreme Court.

THE following is a clipping from an English newspaper: "An action, in which a Glasgow young lady claims £500 for breach of promise of marriage, has been brought in the Glasgow Sheriff Court. The defender in this case states that the young lady, by letter, severely remonstrated with him for smoking, abstention on his part from smoking having been, as she contended, a condition of the engagement. She had given him a final choice between her and a cigar. He contends that he was thus at liberty to choose; and having gone in for the cigar, the young lady has no claim for damages. The Sheriff closed the record, and said he would take time to consider the correspondence and pleadings."

CAPE LAW JOURNAL.

MAGISTRATES' ORDINARY CIVIL JURISDICTION.

There is every indication that the civil jurisdiction at present conferred upon the Resident Magistrates of the Colony by Statute, is not likely to be extended, and as the Courts have dealt with most of the questions that can possibly arise in regard to the existing Acts on the subject, it may be useful to give a brief *resumé* of the law on this important branch of practice.

The ordinary civil jurisdiction of Magistrates is either inherent or statutory.

IMPLIED OR INHERENT JURISDICTION.—In *Barnes v. White* (3 Juta, 181) a person arrested upon a warrant for civil imprisonment, and duly lodged in gaol, was immediately afterwards released by order of the Magistrate who granted the warrant. The gaoler (White) who acted upon the Magistrate's order whereby the plaintiff was damnified, was sued for damages, but the Court held that the Magistrate could order the release for sufficient cause; and this being so, that the gaoler was obeying a lawful order in releasing the prisoner. "The only question," said the CHIEF JUSTICE, "that need be seriously considered is whether the Magistrate who had committed the prisoner to gaol could, for sufficient cause shown, discharge the same person. I am satisfied that such power must be inherent in him by virtue of the very nature of his office. Suppose such a Magistrate had, under certain circumstances in the exercise of his jurisdiction, committed a man to gaol, and then discovered that he had made a mistake in the order, it could not be contended that there was no remedy without an appeal to the Supreme Court." In *H. v. Bossi* (4 Juta, 72) it was similarly decided that a Magistrate having statutory jurisdiction to issue a writ of civil imprisonment, has also an implied or inherent jurisdiction to

suspend its operation if, after the return day has gone by, the prisoner shows that he has no means of paying. And lastly, in *B. v. Magistrate of St. Marks* (5 Juta, 192) the CHIEF JUSTICE, in giving judgment, said, "there is nothing in the Act of 1885, or in the Proclamation of 1882, which gives the (Tembuland) Magistrate power to strike an agent off the rolls at all or to suspend him at all. But it may fairly be argued that such a power must be inherent in the Court. If a Magistrate's Court has the power of admitting agents to practise before it, it must also have the power of suspending or striking off the roll an agent who has abused the confidence of the Court by professional misconduct."

In these cases, it will be observed, that the power allowed the Magistrates was in each instance connected with some species of jurisdiction already conferred upon them by Statute. So that the rule which guides the Courts in these matters is probably this, that where statutory powers have been given, any incidental power necessary for giving full and reasonable effect to them will be taken to have been impliedly conferred as well. But of course this again is subject to the proviso that there is nothing in the Statutes expressly prohibiting the exercise of such jurisdiction.

EXPRESS OR STATUTORY JURISDICTION.—Passing now to the express jurisdiction conferred upon Magistrates by Statute, it will be found to be as follows:—

1. Jurisdiction where the debtor or defendant resides in the Magistrate's district (Act 20, 1856, sec. 8).

2. In all cases founded upon any bill of exchange, promissory note, good-for or other written acknowledgment of debt commonly called a liquid document, in which the sum demanded shall not exceed £250 (Act 43, 1885, sec. 5 a).

3. In all cases (commonly called illiquid) for the recovery of the price of any merchandise, goods or other movable property, when the amount demanded shall not exceed £100 (Act 43, 1885, sec. 5 b.)

4. In all cases (except as hereinafter is excepted) in which the debt or damages demanded shall not exceed £20. (Act 20, 1856, sec. 8, sub-sec. 2).

Exceptions to par. 4 :—

(a). No Magistrate has jurisdiction in, or cognizance of, any action or suit wherein the title to any lands or tenements or the title to any fee, duty or office is in question.

(b). In any action or suit to try the validity of any will or other testamentary instrument.

(c). In any action whereby rights in future can be bound. *Provided* that any Magistrate may in any action for damages for *crim. con.* with the wife of the plaintiff, or for necessities lawfully supplied to the wife of any person, determine the fact of marriage; and may in actions for maintenance lawfully supplied to legitimate or illegitimate children of any person, determine the question of affiliation as far as may be necessary for the decision of the suit without thereby binding or being deemed or taken to bind, rights in the future. (Act 20, 1856, sec. 8, sub-sec. 3).

5. As often as any action or suit shall be brought upon any liquid document for any sum exceeding £20 as aforesaid, the Resident Magistrate shall have jurisdiction to try any plea of set-off, or compensation, or any cross case or claim in reconvention, not exceeding the amount demanded by the plaintiff in his summons, whether the plaintiff shall or shall not succeed in proving the amount so demanded to be due (Act 20, 1856, sec. 8, sub-sec. 4).⁽¹⁾

6. Jurisdiction to issue writ of execution for unsatisfied judgment against defendant's movable property (Act 20, 1856, sec. 12).

⁽¹⁾ A similar clause to this, but one providing for the case where a claim is brought on a liquid document for a sum exceeding £100, has been inserted in Act 43 of 1885, sec 5. The idea of the Legislature may no doubt have been, that as the Magistrate's jurisdiction in cases "commonly called illiquid" was to be £100, claims in reconvention up to that amount could be brought under that section and that it was not necessary to legislate further, except as to claims in reconvention over £100; but the section as to cases "commonly called illiquid" had been qualified and confined to claims only for the price of goods or movables. So that in reality claims in reconvention up to £100 can under sec. 5 (b), Act 43, 1885, only be brought where they are for the price of goods or movables. This being so, and sub-sec. 4, sec. 8, Act 20, 1856, not having been expressly repealed (see on this point, *In re Spalding*, 1 Roscoe. Sup. Ct. Repts, 410), it is submitted that the law now is, that illiquid claims in reconvention, of whatever nature, can be brought up to £250 if a liquid document to that amount is sued upon in the Magistrate's Court—an extent of jurisdiction which certainly seems to call for curtailment.

7. Jurisdiction to decree civil imprisonment, to issue a warrant for defendant's arrest, and thereafter upon the return day, upon cause shown, to withhold or confirm the decree (Act 20, 1856, secs. 16, 17, 19).

8. Jurisdiction to endorse a writ of execution issued by a Magistrate of another district against property of defendant in the endorsing Magistrate's district. (Ibid, sec. 13).

9. Jurisdiction in ejectment (Ibid, sec. 10).

10. (a) Jurisdiction in suits for obtaining possession of leased premises, &c., upon return of *nulla bonâ* to a writ of execution upon a judgment for arrear rent (Ibid, secs. 23 and 24).

(b). Jurisdiction to make a summary order for delivering up of possession where in an action for rent it appears that there is no movable property to be found against which to execute any process of execution (Ibid, sec. 25).

11. Jurisdiction to issue a writ for the attachment of goods as security for rent not exceeding the amount to which the jurisdiction of the Magistrate is limited, due and in arrear, when the said rent has been demanded for seven days and upwards or if not so demanded, when the deponent believes the tenant is about to remove his goods from the premises to defeat the claim in question (Ibid, sec. 26).

12. Jurisdiction as to witnesses required in another district, and as to interrogatories (Ibid. sec. 52).

On the above ordinary statutory jurisdiction of Magistrates many questions have arisen and many decisions have been given which will now be briefly discussed.

Residence.—It will be observed in the first place that the Magistrate's jurisdiction is confined to a debtor or defendant residing in the district. It follows from this that no Magistrate can, by an attachment of goods, found jurisdiction as the superior Court can. And even the wide powers given to the Transkeian Magistrate's by Proclamation have been held subject to the same rule (*Muggleton & Kayser v. Colbeck*, 5 E.D.C., 335).

But whether the section renders it necessary for a Magistrate to go into the question of domicile in a case where exception is

taken that the defendant is no longer resident in the district, though his wife and children may be, has apparently not yet been decided. In *Wildschut v. Kolbing* (3 Searle, 220), it was said that the jurisdiction of Magistrates should be limited at precisely that point at which the Legislature has restricted it, and in a similar question HODGES, C.J., said "the Magistrate must refrain from proceeding further because the Legislature has not entrusted to him the decision of a case involving very technical matters"; *De Kock v. Du Toit* (3 Searle, 231). If these remarks apply at all to the present case, it would seem that the Magistrate should only go into the question of residence and not domicile, and that if it is not proved that the defendant has taken up his residence with any degree of permanency or for a length of time, elsewhere, that he would have jurisdiction where *prima facie* the defendant's home is.

Liquid Document.—A question often arises as to what is meant by "liquid document" in par. 2. The best definition perhaps to be given is, that a liquid document means one in which the liability recorded by it is present, ascertained, and unconditional, that is, does not depend upon any condition, has not to be ascertained and fixed by any enquiry or evidence extrinsic of the document, and is not due at some future date. For instance, in *Colonial Government v. Whitear* (3 Juta, 242) where defendant promised in writing to pay one shilling a day for his brother so long as he remained in the Old Somerset Hospital, and the Government sued on the document for £30, alleged to be the amount due, the CHIEF JUSTICE, in upholding a Magistrate's judgment as to his want of jurisdiction in the matter, said, "it is clear that the plaintiff upon this document would have to adduce some proof as to how many days the defendant's brother had been in hospital; without that, he clearly could not obtain judgment; and oral evidence being necessary the document is not a liquid one." Where again, a promissory note was given for value to be received in shares, the E. D. Court, by majority, held that as the amount of the note was not payable until the shares mentioned had been received by the maker, the note itself was conditional, and therefore not a liquid document, that is, the amount was not due on the face of the document without extrinsic evidence that the consideration had

been fulfilled (*Impey v. Lecyno*, 1. E.D.C., 284); see also *Conelly v. Williams*, 1 Juta, 35; *Mosenthal v. McKinnon*, 1 Juta, 235; *Dicks v. Pote*, 3 E.D.C., 74; *Randall v. Laurrance's Trust*, 5 E.D.C., 174. Of course if the liability is liquid and recorded by more documents than one, they can all be sued on together. The document or documents must also constitute and contain an "acknowledgment of debt" in terms of the section. A taxed bill of costs for instance, although a liquid document, would not be an acknowledgment of debt (*Heyns' Trustee v. Wehmeyer*, Buch. 1873, p. 96).

Illiquid Cases.—Magistrates have jurisdiction under paragraphs 3 and 4 above-mentioned, in illiquid cases, but under par. 3 only claims for the price and not for the value of goods or movables can be heard (*Greyling v. Penny*, 5 E.D.C., 221). Under par. 4 the jurisdiction conferred embraces a much wider class of cases, including in fact every suit in which debt or damages under £20 are claimed, provided the case do not fall under any of the exceptions already given, and which will now be more fully considered.

Title to Land.—It will be noticed that the words of the section referring to claims in which title to land, &c., is involved, are, when such title is "in question." Now the law as to when a fact of this kind must be taken to be in question in a suit was fully reviewed by the E. D. Court in the analogous case of *Abner Major v. John Maketra* (1 E.D.C., 47); and the conclusion arrived at seems to have been that where the Magistrate before deciding upon the claim brought would have to decide upon the fact of plaintiff's title to land &c., then that fact must be taken to be in question and the Magistrate's jurisdiction is ousted. And on this rule it follows that if the defendant admits the plaintiff's title in a suit where, but for the admission, title would have to be proved, the jurisdiction of the Magistrate is saved. But how strict the Courts otherwise are as to the interpretation of the words "in question," may be seen in *De Kock v Du Toit* (3 Searle, 231). Title has sometimes a wider signification in this statute than mere dominium. For instance, in *Reed v. Grahamstown Municipality* (5 Juta, 127), where the question was whether the plaintiff was entitled to have transfer passed to him before certain expenses

had been paid to the defendant, the Supreme Court held that as in this Colony the transfer deed is the title, any question affecting the passing of transfer was a question of title, excluding the Magistrate's jurisdiction.

Future Rights.—The second class of cases which a Magistrate is precluded from trying, embraces those in which future rights may be bound by the decision, provided that in actions for damages for *crim. con.* or for necessities supplied a wife, the fact of marriage may be determined upon, and in actions for maintenance supplied to children the question of affiliation, without being taken to bind future rights, though if the evidence is recorded, it may be used on any future occasion when the same questions happen to be disputed by the same parties. This proviso, it will be noticed, amounts therefore to this, that in such cases the decision as to the marriage or the affiliation, will not operate as *res judicatae*.

In all other cases of this kind, such as in actions for harbouring or abducting the plaintiff's wife, a decision as to the fact of marriage will be beyond the Magistrate's jurisdiction; and the test consequently of what will or will not bind future rights seems to be "will or will not the fact if once decided by the Magistrate be *res judicata*, so as to determine other or similar questions between the same parties in the future which may be based on that fact. For instance, in *Taylor v. Haupt* (5 Juta, 22) it was held that a Magistrate might decide upon a question of sale between one of the parties to it and the broker who sued for commission for effecting it, because the fact of the sale so decided would not bind the other party to it, being *res inter alios acta*. Here the fact in issue could not possibly bind future rights. Sometimes, however, the distinction is one of great nicety. In *Riversdale Divisional Council v. Pienaar* (3 Juta, 225), for instance, where the plaintiff sued the defendant for rates, and exception was taken by the defendant (after pleading that he had paid them to the Mossel Bay Divisional Council), that rights in the future would be bound by a decision in this case, the CHIEF JUSTICE, although noticing that the rates were claimed in the summons "in respect of land alleged to be situated in the division of Riversdale," held that "the question whether a suit is of such a nature that rights in future

can thereby be bound, must be decided by reference to the nature of the suit itself, and cannot be made to depend upon the further question whether or not the facts alleged in support of the action are in dispute. . . . The rates (in the present case) are assessed annually, so that the decision in the present case would not affect the validity of rates that may hereafter be assessed. The action relates to past rates only, and a judgment given in pursuance of it would not bind either the present or future proprietors in respect of future rates." This decision went very far, for there was an allegation in the summons that the land in respect of which the rates were claimed was situated in the Riversdale Division, and from the plea it would appear that the contention of the defendant was that it was situated in the Mossel Bay Division. At any rate, the fact as alleged in the summons was not admitted and would therefore have to be proved in the action, and if once proved, surely it would determine the question as to whether defendant should have to pay the Riversdale Divisional Council upon future assessments or not. It is true the Mossel Bay Divisional Council was not a party to the action, but as between the plaintiffs and the defendant, the latter would be bound by the decision as to his liability to pay the plaintiffs upon future assessments. The case was not like that of *Taylor v. Haupt* above quoted, because there the relation between the parties came to an end with the decision, while in the present instance there would be future questions between the parties arising out of the same fact of the situation of the property. Indeed, the decision is hardly reconcilable with the judgment of the Supreme Court in *Rendwalsdon v. Weise* (Buch. 1875, p. 150) where damages for the abduction of the plaintiff's wife were sought, and in which the Court held that the fact of marriage having to be decided, the case was beyond the Magistrate's jurisdiction, as binding future rights. In the Riversdale case, the CHIEF JUSTICE noticed this, and said "the expression whereby rights in future can be bound is a very vague one. But for the proviso which immediately follows in the Act, I should have thought it did not apply to an action for damages for abduction of the plaintiff's wife, but in the case of *Rendwalsdon v. Weise* it was admitted by the Attorney-General for the appellant that if the validity of the

marriage was really in dispute, the Resident Magistrate could not decide such an action, and in the case of *Major v. Maketra* (1 E.D.C., 47) the same view seems to have been held by the JUDGE PRESIDENT and Mr. Justice BUCHANAN." But the CHIEF JUSTICE then goes on to state the rule above quoted, that the question cannot be made to depend upon the further questions whether or not the facts alleged in support of the actions are in dispute. Now, a somewhat similar case to that of rates annually assessed on property situated in a particular division would be that of a claim to interest upon a mortgage bond, where the interest could not be decided without a decision as well of the validity of the bond. "The case of *Vermaak v. Cruywagen* (3 Menzies, 465)," said the CHIEF JUSTICE in *Krugerv. Van Vuuren's Ex.* (5 Juta, p. 167), "is not quite consistent with the subsequent case of *Lindenburg v. Bosman* (Buch. 1870, p. 50), but it may perhaps be supported upon the ground that as a decision upon the interest alleged to be due upon a bond involves a decision upon the validity of that bond, it would be *res judicata* between the parties to the suit in an action for subsequently accruing interest upon the same bond, and would to that extent bind rights in future."

But while the decision in *Riversdale D. C. v. Pienaar* goes it is submitted, very far, and it is to be remarked that Mr. Justice SMITH said, "during the discussion I was led to believe that a question of boundaries was in dispute. If that were the case, then according to the authorities I have mentioned, future rights would have been bound by the judgment"; yet, as the cases of *Rendwaldson* and of *Abner Major* have not been overruled, it is submitted that the *Riversdale* case will not be applied to other than cases similar to itself; and that the rule still is, that when in the course of a case, a fact upon which the case is based has to be decided, and that by such decision similar questions or broadly, rights in future will be bound, the Magistrate's jurisdiction is ousted.

One other case only need be cited. In *Van der Byl v. Myburgh* (2 Juta, 77) where damages for wrongful diversion of a stream were claimed against the defendant, who set up a right to the water at the point at which he had taken it, the Supreme Court held that as "in this case there was a *bonâ fide* dispute by which future rights would be bound," the Magistrate had no jurisdiction.

Course for a Magistrate to pursue when exception taken.—On this point there have been many decisions. The Magistrate must take some evidence or oath to see whether, upon objection made to his jurisdiction, the objection is *bonâ fide* and that title to land, &c., is really in question, or that some fact is in issue a decision upon which will necessarily bind rights in the future (*Myburgh v. Cloete*, 3 Menzies, 565; *De Jager v. De Jager*, 3 Juta, 69; *Brady v. Michiel*, 3 Juta, 178; *Westfall v. Bartlett*, 1 E.D.C., 72; *Grutzner v. Maddock*, 3 High Court, 151). An exception to jurisdiction may be taken at any point in the case, as soon as it appears that the question is beyond the Magistrate's power to adjudicate upon (*Riversdale D. C. v. Pienaar*, 3 Juta, 252).

Splitting Claims.—Closely connected with the excepted cases which cannot be heard by a Resident Magistrate, is the rule that claims cannot be split up so as to be brought within the Magistrate's jurisdiction. If part of the claim is abandoned for that purpose, there is no objection in law to that being done (*Van der Walt v. Hawkins*, 3 E.D.C., 27); but the rule is strict that claims may not be split merely to bring each half or split portion within the Magistrate's jurisdiction (*Municipality of Steynsburg v. Green*, 3 E.D.C., 239). If there are two or more claims founded on dissimilar causes of action, as for instance a claim for rent and another for goods sold and delivered, against the same person, these actions can of course be brought separately. "The rule against splitting of demands does not apply to demands founded upon totally different and dissimilar causes of action. It would be a misapplication of terms to say that demands are split if there is no legal connection whatever between them" (*Brett v. Soliman*, 4 Juta, 9). But in such a case the plaintiff cannot bring his second claim as a replication to a set-off pleaded by the defendant against the claim in the summons (*Heyns v. Spolander*, Buch., 1875, 44).

Counterclaim and Set-off.—Any counterclaim can be brought by a defendant up to the amount claimed by a plaintiff, whether the latter sue upon a liquid document up to £250 (see note above), for the price of goods up to £100, or for damages up to £20. And when the counterclaim exceeds the Magistrate's jurisdiction the rule is that he cannot hear the case at all (*Randall v. Pote*, 5 E.D.C., 88).

Of course he must first satisfy himself, when a defendant states that he has a counterclaim exceeding his jurisdiction, that this is really so (*De Jager v. De Jager*, 3 Juta, 69; *Brady v. Michiel*, 3 Juta, 179) and that it is not dependent upon other disputed accounts between the parties which are not now sued upon (*Brett v. Soliman*, 4 Juta, 6), for in that case the Supreme Court held that the Magistrate may pass by the counterclaim and deal only with the claim in convention.

Sometimes, however, the plaintiff's claim is for the balance of an account which he annexes to the summons and which contains items to the debit as well as to the credit of the defendant. If this is an account stated and admitted to be correct by the defendant, no difficulty occurs in suing for the balance if the amount is within the Magistrate's jurisdiction. But very often accounts of this kind are sued on which are not admitted by the defendant, and a very nice question then occasionally arises, whether the Magistrate's jurisdiction is not ousted if the amount to the defendant's debit (irrespective of the credits) exceeds the amount to which his jurisdiction in illiquid cases is limited. For instance, to take a case put by the CHIEF JUSTICE in *Kruger v. Van Vuuren's Executrix* (5 Juta, p. 164), if A were to sue B for £100, annexing to the summons an account which shows that A had sold goods to B for £150, but was willing to deduct £50 as damages for an assault, the Magistrate would be quite justified in holding that the willingness of A to pay B the sum of £50 as damages, is no criterion of the damages actually sustained, and that in reality A was suing B for £150. B's demand, if he has any, is not of such a nature that it can be liquidated by A without the consent of B, or without the assistance of a Court of Justice, and therefore A, unless he is willing to forego part of his demand altogether, can only sue B for the full sum of £150 or not at all. In such a case, upon objection made by the defendant, the Magistrate would have to dismiss the claim as beyond his jurisdiction. When, however, the credit in the account is a liquid and ascertained amount, such as for goods sold and delivered, or a promissory note for value received,—when in fact it is a debt which can be set off against plaintiff's claim, the latter is by operation of law extinguished *pro tanto*, if also of a liquid nature,

and the Magistrate has jurisdiction to decide the claim for the balance, if not beyond the amount to which his jurisdiction in that class of case is limited. "If," said the CHIEF JUSTICE "C were to sue D for £15, annexing to his summons a statement showing that C had on the 1st of June, sold goods to D for £60, according to an account rendered to D, and that D on the 5th June sold goods to C for £45, according to an account rendered to C, it is clear that the claim for £15 would be admissible in the Magistrate's Court." But then the CHIEF JUSTICE adds these words "even although D should now dispute the correctness of the account rendered to him;" and it is these latter words which make the decision in *Van Vuuren's* case so all-important, if the opinion of the CHIEF JUSTICE is followed in the matter in the future; for it must be pointed out that Mr Justice SMITH gave no opinion upon the point. Sir HENRY DE VILLIERS goes on to state that "the real question then in cases of this nature, is not so much whether the set-off is admitted, but whether the debt deducted is capable of being set-off at all"; and this enquiry it would seem, the Magistrate can enter upon, if the plaintiff has summary proof of the liquidity of the amount set-off at hand, or "if the liquidation of the amount does not depend upon an account of which a long discussion would be necessary." If, in fact, the two debts are liquid, or easily made so, they are extinguished *pro tanto* by law whether the defendant likes it or not; and all the Magistrate has to do is (really on the same principle, it seems, as that laid down in *De Jager v. De Jager* and the other cases quoted above) to see whether defendant's objection to the liquidity is *bonâ fide* or not. Only to this extent, it is submitted, does the opinion of the CHIEF JUSTICE militate against the decisions in *Beer v. Chiappini* (3 E.D.C., 131), and *Charsley v. Horsley* (3 E.D.C., 433).

Under this head, it may be noticed that counter-claims for debt or damages can only be brought against claims made under the Magistrate's ordinary civil jurisdiction. For instance, where a summons is issued under the special jurisdiction conferred upon a Magistrate by the Master and Servants Acts, for the restoration of a child, a counter-claim for the amount expended by the defendant

upon the child's maintenance cannot be opposed to the plaintiff's claim (*Shaw v. Shaw*, 4 Jut., 424).

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(*To be continued.*)

THE THEORY OF THE JUDICIAL PRACTICE.

CHAPTER VIII.

ESPOUSALS OR ENGAGEMENTS TO MARRY, AND BREACH OF PROMISE OF MARRIAGE.

An espousal or betrothal is an engagement or a mutual promise, entered into between two persons, male and female, capable of contracting and who are not within the prohibited degrees, to marry each other at a future period.

Espousals between persons who stand in the prohibited degrees of marriage are void *ab initio*; and so also is an espousal by one of married persons to an unmarried party who knew of the other's existing marriage, although the engagement was entered into upon the condition of marrying the other upon the death of his or her spouse. But if the party to whom the proposal was made was innocent of the other's marriage then, although the engagement would be void, the innocent party has an action for damages for breach of promise (Grotius 1, 5, 2, and the references; also Van der Keessel, Thes. 62).

The prohibited degrees of engagements as well as of marriage are between all persons who stand in the position of ascendants and descendants to each other, *ad infinitum*, and collaterally to the end of the third degree (see this subject fully treated of in my Chapter on "Marriage.")

Persons who may never marry cannot be engaged to be married; for instance, all those who are incapable of procreation and idiots or madmen (Grotius 1, 5, 4; and see my Chapter on "Marriage.")

A person, either male or female, on attaining the age of seven years may, with consent of his or her parents or in their absence their

legal guardians, enter into an engagement to marry (Van Leeuwen, Cens. For. translated by Schreiner, 1, 1, 11), but he or she cannot marry, even with consent of parents or guardians, before the age of puberty, which is fourteen for males and twelve for females. If a person below the age of majority should become engaged without consent of the legal guardians it is not binding on him or her and he or she cannot be compelled, even by an action, to fulfil and carry out the engagement (Utrecht, Cons., Vol. 1, Cas. 52; Holl. Cons., Vol. 3, Cons. 86; Loenius, Cas. 4 and 55; and *Gray v. Rynhoud*, and *Greef v. Verdeaux*, 1 Menz., 150 and 151).

Among the ancients, the children would either ask the parents to look out for spouses for them or the parents would indicate whom the children should marry; thus Abraham sent his servant to fetch a wife for his son Isaac and he *chose* Rebekah at the well, near the city of Nahor (Gen. chap. 24); Judah *took* a wife for his son Er (Gen. 38, v. 6); and Isaac said to his son Jacob, "go to . . . the house of Bethuel . . . and *take* thee a wife from thence" (Gen. 28, v. 2); Shechem said to his father Hamor, "*give* me this damsel to wife" (Gen. 34, v. 4); and Samson told his parents "to *get* her (a certain woman in Timnath) for me to wife" (Judges 14, v. 2); the Priest of Midian *gave* Moses Zipporah his daughter (Exod. 2, v. 21). Sometimes a king provided a wife for a favourite or minister; thus Pharaoh *gave* Asenath, the daughter of Poti-pherah, to Joseph (Gen. 41, v. 45). Hermione declares that it was her father's business to provide a husband for her (Euripides. *Androm.*, 951).

In the later period of the Roman Republic it was customary for parents to betrothe their young children to suitable partners, sometimes even without their knowledge; and though the children could not be compelled to marry, yet when in years of discretion they were made acquainted with their parents' choice, many of them complied with it. Van Leeuwen also mentions an instance in the Dutch law: "Do you promise your daughter as wife to my son?" "I promise her" (his Cens. For. by Schreiner, 1, 11, 1). I know of several similar instances even in this Colony among leading families.

But our law requires that the consent of the intending spouses must be mutual and voluntary, and if either has been threatened

or unduly influenced thereto or the engagement is entered into through force or fear or against the free will of one or the other, it is void (Brouwer, d. j., Con. 1, 17, 10).

In a speech made by Lord Hartington last year, in the north of England, he said that in almost every high and important political nomination, whether of an ambassador or a governor-general, a question invariably asked by those who have anything to say in the appointment is, "What sort of a wife has he?" thus showing that the wife's influence socially and politically has often been a factor in the selections made to high public offices.

Plato has somewhere said that in choosing a wife everyone ought to consult the interests of the State, and not his own pleasure. This doctrine is still kept up among some sovereigns at the present day, and only recently the State interfered with the betrothal of one of the daughters of the late Emperor Frederick of Germany because forsooth it might have led to political complications. Our law, however, leaves the choice of the betrothal and marriage entirely free to whom you please, whether you are the same or of different creeds or class or nationality.

Jacob Cats, the Dutch Poet, in a long and amusing poem, has stated what sort of a wife he wanted. A few lines may not be uninteresting to some of my readers. He says:—

Niet al te soet, niet al te suur,
Niet al te sacht, niet al te stuur,
Niet al te schouw, niet al te bont,
Niet al tel af, niet al te sout,
Niet al te wys, niet al te gek,
Niet al te ryf, niet al te vrek,
Niet al te loen, niet al te gau,
Niet al te kloek, niet al te flau,
Niet al te ras, niet al te traagh,
Niet al te preuts, niet al te laag,
Niet al te scheef, niet al te fraai,
Niet al te mals, niet al te taay,
Niet al te heusch, niet al te plomp,
Niet al te teer, niet al te lomp,
Niet al te kort, niet al te lank,
Niet al te dik, niet al te rank,
Niet al te vast, niet al te broos,

Niet al te slecht, niet al te loos,
Niet al te kaal, niet al te bont,
Niet al te slim, niet al te ront,
Niet al te schaars, niet al te milt,
Niet al te tam, niet al te wilt,
Niet al te schraal, niet al te vet,
Niet al te vuyl, niet al te net,
Niet al te droef, niet al te bly,
Niet al te bloo, niet al te vry,
Niet al te glat, niet al te stram,
Niet al te rap, niet al te tam,
Niet al te loom, niet al te fel,
Niet al te traag, niet al te snel,
Niet al te mal, niet al te vroet,
Niet al te gaat, niet al te goet,
Niet al te slap, niet al te serp,
Niet al te bot, niet al te scherp.

Proposals from the most ancient days, have generally come from the man. "And the sons of God saw that the daughters of men were fair, and they took them wives of *all of which they chose*" (Gen. 6, v. 2). I have no knowledge of universal

history, so I cannot say whether the women ever proposed marriage. There is, however, nothing in the law of any part of the civilised world to prevent their doing so. It is an absurd fashion only which fetters them. They have at the present day not even the advantages or opportunities which their two ancestors Eve and Rebekah had. The former "was taken to Adam" and the latter was sent to Isaac (Gen. 2, v. 22, and 24, v. 59.)

The ladies, as the leaders and moulders of Society, and inventors of fashion, should resent and break through this fashion, and not be so selfish as to retain to themselves the privilege of saying "No." If one of them takes a fancy to a man whom she knows to be either too nervous and bashful to propose, or whom she knows from his position, either through poverty or social inferiority or superiority, to shirk proposing, why should she not make her feelings known to him, just as well as the man is allowed, nay even encouraged, by society to make his feelings known to her? Many ladies have braved dangers and risked their lives for the sake of others or for the sake of common humanity, on battlefields, and in pestilences and in hospitals. Many have also studied for and mastered all sorts of professions and spoken from all sorts of platforms in spite of tremendous opposition from all sorts of people, males and females and from the most learned man to the biggest dunce. Many of them have also undertaken, sometimes even by marriage, to reclaim a rake or a drunkard or to mould a vagabond into something good; yet amidst all these trials and oppositions they have retained their good name and virtue without even a shadow of suspicion. Why then should they remain the slaves of fashion, when they have proved that they can do what man has done, especially when the question is purely a social one in which they have as much, if not even a greater, interest than men? Many a man who has had a contempt for the female race has through the influence of the ladies been brought to warmer and juster sentiments towards the opposite sex and has never thought of reproaching them for anything they have done under those circumstances or for perhaps, accompanying and attending to the sick and wounded in the Red Cross Hospital Ambulances in times of war. It only requires half a dozen leading ladies of Society to set the example by proposing marriage

and fearlessly proclaiming it to the world ; others will soon follow suit.

Though the mutual promise implies a future marriage there is nothing to prevent the parties marrying at once (Hol. Cons., Vol. 5, Cons. 147).

Sometimes on the day of engagement a reason is given or it is apparent why the marriage cannot take place at once or shortly or an arrangement is subsequently made deferring it to a later period. When a time has been fixed it must be abided by and neither party can, without the consent of the other, alter it. Where no time for the marriage has been agreed upon on the day of the engagement or shortly thereafter, it must then take place within a reasonable time ; and either party afterwards calling upon the other to fulfil the engagement the other must give good reasons for the excuse and that these come within the limits of the original causes of deferring the marriage at the time of the betrothal or subsequently or that the delay is reasonable.

But this future period is not for ever to remain in uncertainty ; it must be within a reasonable time ; and what this is, depends upon and varies according to the circumstances of each particular engagement. The Court must be satisfied, whether from the position of the parties, the nature and period of their engagement, a reasonable time has elapsed for the fulfilment of the promise. Thus, a student while he is *bonâ fide* qualifying himself for his chosen profession can plead delay till he has passed the necessary examinations and been admitted, if he was studying for the profession at the time of the engagement and the girl knew of it. Also a man without means, but who is honestly endeavouring to earn sufficient to support himself and a wife can reasonably plead delay. So also can a man temporarily absent on the service of the State, and the uncertainty of the date of his return ; or one who is so situated that for no fault of his own he is for the time being unable to go to his fiancée to fulfil his promise ; or, a soldier or sailor on special service or by being held in captivity.

If the excuses offered are not satisfactory or the delay to marry is unreasonable, the innocent party can break off the engagement forthwith (Hol. Cons., Vol. 4, Cons. 368 ; and *Ballum Juridicum*, Cas. 34).

An espousal does not require any particular form of words or solemnity to make it binding and it may be entered into either verbally or in writing or in any other way; the *essential requirement of the law is the mutual agreement of the parties* and this may be expressed either personally or by letters or by conduct or by means of others, for instance, by procuration or by a third party especially authorised thereto, which is frequently done among illustrious persons. Thus Abraham sent his servant to ask a wife for his son Isaac and he chose Rebekah (Gen. 24, v. 4, 47, 51-67).

An engagement entered into through fraud by either party is void *ab initio*.

Also, if one of the parties were to say to the other, "as long as I live, I shall not desert you," it is no promise of marriage, although concubinage may have followed, because this may be interpreted to mean a general support (Hol. Cons., Vol. 3, Cons. 54; and Huber Hed. Regts., Bk. 1. Chap. 5, n. 6).

"I marry you," or "I give you my pledge," is no promise of marriage; because they are said in the present, whereas an offer or a promise or a contract to marry should be in the future tense; therefore, "I shall marry you," or "promise to marry you," is binding (Hol. Cons., Vol. 1, Cons. 318, and Vol. 2, Cons. 219; Loenius, Cas. 43).

Sleeping together is no proof of promise of marriage (Hol. Cons., Vol. 3, Cons. 90, n. 14).

Nor any presents given by the one to the other (Hol. Cons., Vol. 4, Cons. 105, and Vol. 5, Cons. 218); or kissing each other is no proof of promise of marriage (Loenius, Cas. 14).

An illegal, an immoral or an impossible condition is not binding; nor is an indecent or disgraceful or scandalous condition (Hol. Cons., Vol. 5, Cons. 106; Van der Keesel, Thes. 47 and 48).

A man asked a woman to be his wife? She answered "Ask my father—his answer shall be my answer." He asked the father, who said "Yes." She thought he would say "No." This was not binding on her, on the ground that there was not a mutual agreement, as she thought that the father would say "No." More especially if she could give satisfactory reasons why she thought he would say "No." But if she had simply left the decision entirely and unreservedly in the hands of her father, to be guided

by his answer, and by some word, act, or deed had afterwards ratified his answer, that would be binding on her.

"When shall you and I stand like that?" said a man to a woman pointing to a bride and bridegroom before the altar. She answered "whenever you like." In themselves this question and answer are not binding on either party, but coupled with the conduct of the parties either before or subsequently, they may be held binding. I know of several marriages where people traced their betrothals to similar questions and answers, which though at first were out of idle gossip or fun were afterwards regarded by the parties as serious.

So also speaking of a marriage, "when shall we follow suit?" or "when shall you and I do likewise?" or "would you like to be nearer related to my family?" "will you come and share my house with me?" are abstractedly not proposals of marriage, but coupled with conduct or the nature of correspondence, before or since, may be regarded in that light.

Many young people between whom there was an "understanding," or who were on a fair way to betrothal, would have become engaged, but for the undue haste of relatives or friends to chaff or tease them about it. The result has often been that by way of denial or exculpation one party has unnecessarily and unintentionally made disparaging remarks of the other, as a reason or excuse why he or she would never think of marrying the other. These, in turn, again have led to coolness in some families, and even to actions of slander. But apart from the iniquitous habit of this premature teasing, young men have suddenly ceased to meet the lady anywhere, or to visit at her parents' house as before, not even by invitation and thus have caused unnecessary surprise and pain to the parents as well as to the young lady.

The contract of engagement must be in earnest, and must be clear so that no other construction can be put upon the meaning of the parties from any expression used by either towards the other, than that of a promise of marriage (Hol. Cons., Vol. 3, Cons. 90, n. 5 and 35; Dig. 23, 1, 4 and 13).

"I promise to marry you," is binding, and if this is accepted is perfectly valid; so also "I shall marry you" (Hol. Cons., Vol. 3, Cons. 7, 41 and 42, and Vol. 1, Cons. 318).

An ante-nuptial contract entered into by the parties is proof of the engagement to marry (Van Alphen's Pap., Vol. 2, p. 552).

A promise made by the one party to the other, while drunk, is binding, as drunkenness is no excuse, unless the party succeeds in proving that his or her drunkenness at the time of the proposal amounted to insanity or complete loss of reason (Loenius, Cas. 46; Brouwer, de J., Cor. 1, 4, 11 and 12).

A promise of marriage may be made conditionally and is binding provided it is reasonable; for instance, "I accept your proposals on condition that you pass a creditable law examination at the next University Examinations." (Van Leeuwen Cens. For. by Schreiner, 1, 1, 4).

A young attorney who was in the habit of concluding or winding up his love letters to his lady-love with the hackneyed old legal phrase "yours, without prejudice," was sued by the lady for breach of promise of marriage, and defended the action on the ground of the precautionary words here used, which he said protected him from any action of the kind. But the Court (this happened in England in 1886) very properly told him that he had wholly misapplied and misunderstood the meaning of the words and condemned him in damages.

So long as a proposal has not been accepted the maker may recall it and the opposite party can take no action thereon. But from the moment it has been accepted, although by a minor accepting that of a major, the latter is bound and cannot withdraw on the ground that the other was a minor and had not the consent of his or her guardian. Of course if the minor made or accepted a proposal without the consent of the guardian, it is not binding on him or her, but the major is nevertheless bound whether it is pleasing to his or her parents or not. If the minor had the consent of the guardian, then he or she is as much bound as the major. If he or she had not the consent of the guardian and does not recall the engagement before or on becoming of the age of majority, then the engagement would be regarded as continuing and binding; (Hol. Cons., Vol. 3, Cons. 86, 90; Huber, Heds. Regts., 1, 5, 15; Utrecht, Cons., Vol. 1, Cons. 52).

Prof. Van der Keessel says (Thes. 58) that "of two espousals, whether absolute or conditional, the *prior one should have*

preference, unless the latter has been confirmed by marriage celebrated in due form." I can find no confirmation of this doctrine. He cites no authority whatever. The nearest approach to Van der Keessel's view that I can find is the 92nd Case in Loenius's decisions. Loenius also cites no authority. But that case seems to have been decided on other grounds than the bare fact of priority of engagement and the engagement there was also a clandestine one and was followed by *concubitus*. Probably it was a decision on some purely local custom of one of the small states before the union of the various Provinces of Holland. The case is an isolated one and not referred to by any of the writers. Anyhow, it and V. d. Keessel's assertions are against the general principles of the law on the subject, and there is nothing to prevent a person being engaged to two or three or a dozen people at a time and to make his or her choice which one of the dozen he or she would marry, taking his or her chance of suits of action for breach of promise being brought by the other eleven.

From the most ancient period it was customary for the engaged parties to make presents to each other; sometimes their relatives also made them presents. Thus Abraham's servant gave "jewels of silver and jewels of gold and raiment," to Rebekah (Gen. 24, v. 22, 30, 47, 53); and so also Shechem offered, if he might but have Dinah for his wife, any dowry that should be demanded for her and any gift to her relatives (Gen. 34, v. 12).

In certain cases, when the intended husband was unable to give the customary presents, service of some kind was substituted. Thus Jacob served 14 years for Rachel (Gen. 29, v. 18-20, 27, 30); or some other act was demanded by the father of the girl (1 Sam. 18, v. 25-27).

Occasionally a father endowed his daughter; thus Caleb gave Achsah certain springs (Josh. 15, v. 16-19; Judges 1, v. 12-15); and Pharaoh gave the city Gezen to his daughter, Solomon's wife, (1 Kings, v. 16).

In the Roman period an *arra*; or earnest (Dutch, *Godepennin-gen*) was given by one party to the other, by way of pledge of good faith to abide by the engagement. At the present day rings are exchanged. But it never was, nor is it now the law, that any pledge or present or dowry should, as a matter of course, be given

on an engagement. It was and is customary and complimentary but not obligatory, and I know of many instances where it was part of the engagement by one or other of the parties not to give or to accept any engagement or wedding ring to or from the other.

An engagement by letter is of course easy of proof by the production of the letter, and an engagement by proxy is also easily ascertained by proving the authority to enter into the engagement and even an engagement verbally made is sometimes not difficult of proof, for this like other agreements must be verified by the ordinary and usual mode and kind of proof.

Some engagements by means of correspondence cannot be gathered from any one particular letter or single passage in a letter, but they may be from a series of letters. It frequently happens that if you take one letter, or say every third or fourth letter from a packet, there will not be found sufficient *primâ facie* evidence of an engagement; but if you read all the correspondence between the parties, and get the doubtful phrases or myterious expressions known only to lovers or allusions therein explained, you have strong proof of an engagement. If then the party who asserts the engagement gives a reasonable account of his version of the correspondence and satisfactorily explains the doubtful allusions and that such myterious language as used by both or either of them was understood by them in the sense he now explains their meaning, a *primâ facie* engagement can be reasonably assumed, unless indeed the other side can succeed in disproving the meaning assigned by the plaintiff, and gives a satisfactory account of his or her correspondence and that the language or expressions used are capable of a wholly different and withal consistent interpretation to that put on them by the plaintiff.

Again, there are instances where the letters by themselves, though taken as a whole, prove no *primâ facie* engagement, but coupled with conversations of the parties, or what one or other of them said to someone else, and their general conduct, all compared and taken together go to prove an engagement.

It is a rule of law that a *betrothal may be made in any way* and though frequently there is a question and an answer, these are not absolutely necessary. "The subject of marriage is broached (says

Van Leeuwen, Cens. For., translated by Schreiner, Bk. 1, Chap. 2, § 8), and virgins promise themselves away for the most part in some retired nook, far from spectators."

Where there is a question and an answer, the Court must judge of them ; but there are many engagements where there has been a question or a proposal of marriage, but no direct answer given of either *yes* or *no* ; from this arises the common expression, especially at tea tables, that "silence gives consent." Nothing can be more erroneous. A woman may be thunderstruck at the audacity of a man to dare to propose to her, and she may simply look at him, either in bewilderment or surprise, and not say a word. To construe this silence into consent is absurd. Or she may give him such a stare or withering look, without saying a word, as to be tantamount to the most emphatic *no* that can ever be uttered. Or take another instance ; she may simply ignore his question, whether from callousness, indifference, inexperience, youth, shame, bashfulness, or for quiet, or peace sake, not wishing to commit herself or whatever reason or cause she may have. Such silence cannot be construed into consent. But when her silence is coupled with an *overt* act, that is, by open assertions, acts or conduct generally, going to show that she favourably entertains the man's attention to her, then such conduct must be construed in favour of the man's intentions, and into an acceptance of his proposal. To illustrate this principle I give you two examples, for and against ; excuse their length, but to give a practical instance I cannot curtail them, and first as to the latter :—

A lady whose father was in gaol for debt, endeavoured by every means to liberate him, but failed. A young man who had previously unsuccessfully wooed her, thought now was his chance and he called upon her ; he said he had heard of her father's misfortune and came to sympathise with her. Anyhow, after a long conversation, during which she repeatedly cried, she appealed to him for assistance. He answered, "Yes, if you will consent to be my wife?" She blushed, dropped her head, but gave no response. He then took her hand and repeated his question, at the same time putting his arm round her neck, to which she made a show of resistance and he gave her a kiss, which she also feignedly tried to resist, but did not speak. After a pause, she asked him, "Will

you really pay my father's debt?" He answered, "Yes, upon my word of honour, and to-morrow morning at 9 o'clock he shall be a free man." "Oh, how good of you," she exclaimed, "thank you so very much, we shall all be very grateful to you;" and then kissed him, and at the same time releasing herself from his hold, left saying, "Let me go now and tell the family," which he took to mean, to tell them of their engagement. The next morning the debt was paid by him, and the father was released from imprisonment. The young man repeated his visits every day for several days, but never saw the young lady alone, though she was more friendly to him than formerly, but as it subsequently proved, she always avoided seeing him alone. He then told her father of his engagement to her and on her denying it he narrated, the occurrences here mentioned. She, in her defence or excuse, admitted what passed between them, but explained and proved that before the occurrence of these facts he had paid her marked attentions which she never returned; explained that she was in great distress at her father's incarceration and felt that when the man made the offer to pay the debt and attempted to kiss her, that if she wholly resisted the kiss he might withdraw that offer; for the same reason she did not forcibly resist his putting his arm round her neck, and that on being for the second time assured that he would pay the debt, she out of gratitude thanked and kissed him; that when she said she would "tell the family," she meant what in fact she did, to tell them of the prospect of her father's release the next morning and by whom, but she never mentioned a word to a soul about the proposal, nor would she ever have said a word about it, till he broached the subject to her father; that her whole conduct, before as well as since the proposal, was one of avoidance and that the family knew she did not care to meet him alone; and that the only occasion of their meeting alone was the one here mentioned, and which was in her father's interest.

Surely no engagement can be inferred from this; and such conduct of a young lady so situated is perfectly consistent with the facts of her denial of an engagement, and excusable under the circumstances, as only those who have been in great distress, want, trouble, and trial, can, with a perfectly clear conscience and with a due regard of the utmost sense of propriety, testify.

Now as to the former example :

On a lady admitting the proposal, but denying the promise, of marriage, the young man, who was very nervous and bashful, sought advice. He could produce no letters and had no witnesses, and was asked by his legal adviser to give a true and full statement, such as he could swear to in Court, of all the facts upon which he founded the lady's promise of marriage, and did so as follows in a stuttering, blushing, and a serio-comic way: "Miss——and I, after promenading about the garden, as we frequently did, resolved to return to the reading room to see the morning paper. I had been endeavouring all the morning to propose to her, but could not summon courage. On the pretence of reading the latest European telegrams together, I somewhat abruptly said, 'Will you be my wife?' She dropped the paper, looked down, blushed, turned round, and moved slowly off as if to leave the room. I said 'Miss—— don't go away, you might at least say good-bye before you go,' and at the same time I advanced up to her, gently and tremblingly took hold of her right hand; she did not withdraw it, I felt her hand trembling in mine, my knees began to tremble also and knocked together, I felt as if I was going to sink in my boots; at the same time I felt also a choking sensation in my throat and for a few seconds there we both stood as if dumb-struck and pinned to the ground. But beginning to dread that someone might come into the room to put it in order before the usual time, I gently tried to face her; her head was lowered and her face covered with blushes. I had still hold of her hand and where I mustered courage from I don't know, but I felt I grew a little familiar, and for the first time called her by her name and stuttered 'Oh Lily,' and then I felt as if I was choking. I coughed, I verily believed from the choky sensation, upon which she turned round, looked me in the face and I gazed nervously and tenderly into her eyes; she blushed all the more and then gently dropped her head on my shoulder, and closed her eyes. I put my one arm, for the first time in my life, round her waist, while still holding her one hand in mine; she made no resistance, and I then stole or imprinted a kiss, also my first kiss, gently on her forehead; again she made no resistance. I then drew her nearer to me, and held her somewhat more tightly round the waist,

just as one would do when about going in for a wild waltz. Again no resistance. She then opened her eyes, looked up to my face, put her free arm timidly round my neck, blushed more than ever and whispered 'Jack,' the first time she called me by that name. I then kissed her two or three times on her lips and received a kiss in return, and then we stood for a few seconds hugging and kissing each other till her breakfast bell rang, and then—I felt that she meant *yes*."

Now suppose this occurrence was afterwards denied by Lily as an acceptance of the proposal, it would be for Jack to prove it at the trial coupled with the further proof that his visits and attentions had always been favourably received by the lady and of their frequent meetings and walks together alone; and it would be for Lily to explain her conduct, why she went beyond the usual bounds of modesty and propriety allowed by society to only those who are accepting proposals of marriage, or who are engaged to be married; and if she failed to satisfy the Court, she would be held by her behaviour to have accepted the proposal.

But the most difficult kind of engagement to prove is that in which there was no proposal made or question asked, and of course no answer given, but somehow or other the parties find themselves engaged to be married or in that position of mutual confidence tantamount to an engagement, from which neither of them can morally and honourably withdraw and they do not know from when it dates. This kind of engagement is what some young ladies call an "understanding;" and it is this "understanding," which the parties themselves often do not understand, that the Court is asked to interpret.

To arrive at this "understanding" between the parties, it has often to be traced far back and a great variety of little incidents have to be put together and the conditions and circumstances of life and ways and habits and education or ignorance of the parties, have also to be considered. Many of these "understandings" have their origin in various causes, but most frequently, though it may seem incredible, arise from condolence at interviews at the loss of a valued friend or relative, in speaking of his or her good and many virtues and each bringing to the notice of the other some favoured

expression or good quality of the departed or consolations offered at the disappointment of a broken-off match especially when it is at the same time announced that the man is engaged to be married to another and then join in running him down and calling him by all the ugly names mentioned in the Dictionary; or from sympathy at the disappointments, losses, misfortunes, troubles, trials, or illness of another; or even from regret or sorrow at the persecution one receives at the hands of another; or sometimes for a very ridiculous reason; thus it was said of Hall, the preacher, that he offered his hand to his maidservant the first time he saw her, because she put coals on the fire precisely as he would have done himself! And there is a story of another gentleman that he chose a lady for his wife because he liked her way of eating cheese!

But whatever its cause or origin the Court has to ascertain whether from all the circumstances concerning the parties as disclosed at the trial when fitly pieced together, an engagement to marry each other must be presumed.

In the enquiry on this point, every incident going to prove this agreement, must be taken into consideration. Little isolated acts, hints, looks, signs or gestures, or expressions dropped now and then by either party and all the other little mysticisms which lovers know how to indulge in, when disassociated from the idea of an engagement, may be perfectly natural and innocent in the eyes of the beholders, but when put together and taken as one united whole, may go far to strengthen, if not prove, the plaintiff's case. All the circumstances of the alleged engagement, and the conduct of the parties, their acts and behaviour towards each other in public, and everything written or said by either of them to each other, or to anybody else, about the engagement, must be taken into consideration (Hol. Cons., Vol. 5, Cons. 84). The general behaviour may be such as to justify the remark of a certain busy-body, meddlesome disappointed old maiden aunt, whenever she thinks from the conduct of the parties that they must be engaged, and when it is denied, "If you hain't engaged, you haught to be," meaning thereby that if a man's intentions be honourable to a virtuous woman, he should not pay her unusual and conspicuous attentions to the neglect, or regardless of the presence, of other ladies; if so, the conclusion is that he is wooing her; and

if she reciprocates such attentions, the inference is that there is an "understanding," or an implied engagement, which they may as well formally announce to the public.

Frequent visits to the house of the lady and seeing her alone, and being otherwise frequently seen in her company; going out with her for walks or drives or rides; withdrawing themselves at parties or dinners or games to secluded or isolated spots; or their behaviour in a Ball Room by noticing each other as if they were each other's exclusive property or coming to enjoy themselves only and not considering others; or presents given to each other, kissing and winks or signs which they do not wish others to know of; carrying out each other's wishes or desires as to accepting or declining invitations or as to dress; or the gentleman less frequently visiting other families than formerly, and being in consequence seen more at the lady's house than usual, and also frequenting his club less during his spare hours; also by more frequently going with the lady to her church and less to his own; and otherwise by constantly paying her unusual and marked attentions wherever she may be and which if she does not openly reciprocate she certainly does not avoid. All these little acts, incidents and occurrences, when put together, go far to prove the intention, or leaning, of the parties; and if either of them asserts an engagement and proves the greater part of such events, it will be for the defendant to disprove them. It is, however, easy to deny an engagement, but the bare denial, even on oath, will then not count for much. Satisfactory proof must be given why these liberties or attentions were indulged in or tolerated; and why the exclusiveness or isolation at public places? and why the kisses and the presents and all the other little occurrences here mentioned? Of course such conduct may be capable of explanation, but the explanation must be satisfactory and such as any reasonable man or the Court can accept as being consistent with the probabilities thereof. The best guides in such a matter, for a Court or a jury, are common sense and a knowledge of human nature.

An espousal may be dissolved by mutual consent; but besides this, either party may dissolve it, even against the wish of the other, upon just grounds, of which the following are the chief causes (Loenius, Cas. 43):—(a) In a conditional engagement, if the condi-

tion has not been fulfilled by the time or on the event agreed upon. (b) For criminal conduct of either party, before or after the engagement; for instance, if after the engagement either party discovers that the other is leading or has formerly led an unchaste life, but if they were aware of it at the time of the engagement, then he or she would be liable to an action on refusal to complete the marriage (Holl. Cons., Vol. 3, Cons. 90, n. 15; Van Alphen's Pap., Vol. 1, p. 4). (c) If either party leads or has led a dishonest life or the man finds out that the woman whom he thought to be innocent was not a virgin; for in a promise to marry chastity and modesty are tacit conditions (Hol. Cons., Vol. 4, Cons. 283, and Vol. 6, 2nd pt., n. 107, and Schreiner's Van Leeuwen, 1, 1, 28 and 29). (d) Adultery committed by either party. (e) If either party has been convicted of a crime, and the other did not know of it at the time of the engagement. (f) If after the engagement either party leads a drunken, dissipated or profligate career, (Loenius, Cas. 14). (g) If during the engagement an unfortunate event occurred in the family of either, for instance, if anyone is punished criminally or the mother of either is confined of an illegitimate child. (h) Theft committed by either party (Loenius, Cas. 14). (i) If either is deeply involved in debt (Van Leeuwen, Rom. Holl. Recht, Bk. 4, tit 25, § 5; Utrecht Con., Vol. 2, Cons. 104). (j) If either party becomes bankrupt or insolvent (Loenius, Cas. 14). (k) If any fraud has been practised by either party upon the other, as an inducement to the marriage, either as to the property or as to the social position of the parties; for instance, if false representations are made as to the wealth and amount of fortune, &c. and if either gives him or herself out to have a certain trade or profession or calling, and it is afterwards discovered not to be so (Hol. Cons., Vol. 2, Cons. 104, n. 2 and 3; Utrecht, Con., Vol. 2, Cons. 104; and Schreiner's Van Leeuwen, Cons. For., 1, 1, §§ 28 and 31). (l) If after the engagement either party secretly parts with his or her property or wealth, because this may be said to have been an inducement towards the engagement. (m) If either party behaves brutally or uses great violence towards the other, after the engagement, for it may be conjectured that this will be repeated after marriage. (n) Impotency or incapability of either party to procreate. (o) If during the

engagement either party becomes blind or deaf, perpetually maimed or disfigured. (*p*) If either becomes deformed; for instance by the loss of nose or lips (Van Leeuwen, Rom. Hol. Recht, p. 432, § 7; Huber Hed. Regts., Vol. 1, p. 42, n. 12, and Van Leeuwen, Cens. For., 1, 1, 30). (*q*) If either party engaged to bring a certain sum of money into the marriage, but failed to do so. (*r*) If either party has changed his or her religion since the engagement or if from circumstances either believed the other to be of a certain religion, but subsequently finds out it is not so. (*s*) If either party becomes a monk, a nun, or a member of the cloisters. (*t*) By becoming a spendthrift. (*u*) Insanity of either party. (*v*) If the parents of either party promise to settle a dowry, and fail to do so (Van der Keesel; Thes. 60). (*w*) Perpetual or incurable bodily disease of either party (Huber, Hed. Regts., Bk. 1, Chp. 6, § 12). (*x*) By prescription; for instance, if either party without good grounds as to justifiable delay hereinbefore mentioned, remains quiet or in default to carry out his or her promise during two years, and when called upon to fulfil the same, fails to do so without sufficient cause (Van Leeuwen's Rom. Hol. Recht., Bk. 4, Tit. 25, § 8; and Dig. 23, 1, 17; c. 5, 1, 2). (*y*) Long and unknown absence for three years (Cod. 5, 17, 2).

If a woman has been forcibly seduced against her will, it is no cause for breaking off the engagement. If then either party breaks off the engagement without any lawful cause, he or she may by the Law of Holland, and so formerly also with us, be either compelled to marry the other, or to pay damages for breach of promise. The choice of either action was at the option of the innocent party, and if he or she chose to sue for a fulfilment of the marriage, and the order was given, as indeed the Court could not withhold it, and the defendant declined to marry after this order, he or she could be civilly imprisoned till the order was complied with (Placaat of 18th March, 1656, art. 22). There are several cases decided in this Colony where the reluctant party has been ordered to marry the other *in foro ecclesiae*, within a time fixed by the Court (*Jooste v. Grobbelaar*; *Richter v. Wagenaar*, 1 Menz., pp. 149 and 262). But though the Court could order the marriage, they could not compel the parties afterwards to live together

as husband and wife; and accordingly, one young man who was imprisoned for failing to marry the girl he had promised to, finding that he could be detained in prison all his life unless he complied with the order, offered to marry the girl forthwith in the Lutheran Church in Strand Street, Capetown, of which Church both were members. The girl was apprised of this and consented, and forthwith both went to the Church, he in charge of a policeman who had to see that the order was carried out and with instructions that if he did not marry to take him back to gaol. The parties were duly married and the register signed, when he took his hat and hurriedly walked out at the vestry door, leaving the girl in surprise and embarrassment to go out at the main door, without explaining his conduct. He had complied with the Court's order and could not be re-arrested.

Owing to a large number of emigrants from England, and their children, born here, being compelled to marry colonial born women or men, or *vice versâ*, to whom they became engaged to be married, a representation was made to the Home Government by some of the more influential emigrants of the hardship and iniquity of a law which compelled a marriage, not only between the emigrants and colonists, but among the colonists themselves, where either of the betrothed parties has ceased to desire to marry the other, and particularly was the feeling very high on both sides—the emigrants and the colonists—at the time when certain prejudices were still very great. Accordingly by an order in Council, the Home Government passed a law of the 7th September, 1838, now called the Marriage Ordinance, by the 19th section of which the action for compelling the marriage was abolished. By the 20th section a remedy is given to the aggrieved party to institute an action for breach of promise of marriage. But this was unnecessary, as he or she could do so under the common law.

Servius Sulpicius Rufus, who died B.C. 42, mentions that even in his time the action for breach of promise of marriage was in force. If either party has married another person, then it becomes impossible to fulfil his or her engagement, and the disappointed party may at once commence an action for breach of promise; so also may either of them from the moment the other has positively refused to carry out his or her promise or from the

moment there is sufficient other evidence that he or she does not intend to carry out such promise.

The action for damages for breach of promise of marriage is for compensation for loss of comfort or social position, or as some writers put it according to the value of the match to the person disappointed, either party may have sustained by the non-fulfilment of the promise; and the amount to be awarded is entirely in the discretion of the Court, who must be guided by the circumstances of each case, the social position of the parties and the pecuniary means of the offending party. But besides this general compensation, the disappointed party may, in addition, recover the amount of any actual expense he or she may have been put to in making the necessary arrangements or preparations for the marriage, according to the position of the parties; also if either party has given up a trade or situation in anticipation of the marriage, or if the lady has received an offer of marriage from another gentleman but refused it in consequence of her prior engagement, or if either party has gone to or come from one place to another in order to be married and has to return in consequence of the refusal of the other party to marry, and thereby incurred certain expenses; all these are causes which entitle the plaintiff to claim and for the Court to award special damages.

Whatever either party has given to the other during the engagement, must be returned if the marriage does not take place; so also if either party dies before the marriage can take place, whatever is given must be restored to the other or to his or her heirs, as all such donations are presumed to be made in contemplation of the marriage (Grotius, 3, 2, 20, and references).

The following extract from a speech of the late Lord Erskine, one of the most eloquent forensic orators of his day, seems a suitable close for this Chapter. It was in an action in 1780, by Mrs. Morton, a widow, against Fenn, a widower, for damages for breach of promise. Both parties were old and ugly. The jury had awarded the plaintiff £2,000. This the defendant thought excessive, and moved the Court to have the verdict set aside. Erskine, for the lady, opposed, and was successful.
 "The jurisdiction of the Court in cases of excessive damages stands upon so sensible and so clear a principle

that the bare stating of it must, in itself, be an answer to the rule for a new trial. . . . But there is a catalogue of wrongs over which juries, where neither favour nor corruption can be alleged against them, ought to have an uncontrolled dominion, not because the Court has not the same superintending jurisdiction in these as in other cases, but because it can rarely have any standard by which to correct the error of the verdict. There are other rights which society is instituted to protect as well as the right of property, which are much more valuable than property, and for the deprivation of which no adequate compensation in money can be made. What Court, for instance, shall say in an action for slandering an honest and virtuous character, that a jury has over-rated the wrong which honour and sensibility endure at the very shadow of reproach? If a wife is seduced by the adulterer from her husband or a daughter from the protection of her father, can the Court say this or that sum of money is too much for villany to pay or for misery to receive? In neither of these instances can the jury compel the defendant to make an adequate atonement, for neither honour nor happiness can be estimated in gold, and the law has only recourse to pecuniary compensation from the want of power to make the sufferer any other. These principles apply in a strong degree to the case before the Court. It is, indeed, a suit for breach of contract, but not for a *pecuniary* contract; injury to *property* is an ingredient, but not the *sole* ingredient of the action. There is much personal wrong, and of a sort that is irreparable. There is upon the evidence reported by your Lordship, loss of health, loss of happiness, loss of protection from relations and friends, loss of honour which had been before maintained (in itself the full measure of ruin to a woman), and added to all these, there is loss of property in the disappointment of a permanent settlement for life, and for all this the jury have given two thousand pounds, not more than a year's interest of the defendant's property. . . . The plaintiff appears to be the daughter of a clergyman, and to have been bred up with notions of a gentlewoman; she had been before respectably married, in which condition and during her widowhood, she had preserved her character, and had been protected and respected by her relations and friends. It is probable that her

circumstances were very low, from the character in which she was introduced to the defendant, who being an old and infirm man was desirous of some elderly person as a housekeeper, and no imputation can justly be cast upon the plaintiff for consenting to such an introduction for by Mr. Wallace's favour (the Counsel for the defendant), the Jury had a view of the defendant, and the very sight of him rebutted every suspicion that could possibly fall upon a woman of age, constitution or complexion.

The age of the plaintiff, who is a woman towards fifty, was another topic, so that a crime is argued to be *less* in proportion as the temptation to commit it is *diminished*. It would be in the defendant's favour if the promise had been improvident and thoughtless, suddenly given and as suddenly repented, but the very reverse is in evidence, as she lived with him on these terms for several months, and at the end of them, he repeated his promises, and expressed the fullest approbation of her conduct. It is further in proof that she fell into bad health on discovering the imposition practised on her, and his disposition to abandon her. He himself admitted her vexation on that account to be the cause of her illness, and his behaviour under that impression was base; having determined to get rid of her, he smuggled her out of his own house to her sister's under pretence that change of air would recover her, and continued to amuse the poor creature with fresh promises and protestations, still without provocation, and without notice or apology, he married another woman young enough to be his daughter, and who, I hope, will manifest her affection by furnishing him with a pair of *horns* sufficient to defend himself against the Sheriff when he comes to levy the money upon this verdict. By this marriage the poor woman is abandoned to poverty and disgrace, cut off from the society of her relations and friends, and shut out from every prospect of future settlement in life suitable to her education and her birth; for having neither beauty nor youth to recommend her, she could have no pretensions but in that good conduct and discretion which, by trusting to the honour of the defendant, she has forfeited and lost. On all these circumstances, no doubt, the jury calculated the damages, and how can your Lordship unravel or impeach the calculation? They are not like the items in a trades-

man's account or the entries in a banker's book ; it is for loss of character so much, for loss of health so much, for loss of the society and protection of relations and friends so much, and for the loss of a settlement for life so much. How is the Court to audit this account, so as to say that in every possible state of it the jury has done wrong ? How, my Lord, are my observations, weak as they are as proceeding from me, but strong as supported by the subject, to be answered ? Only by ridicule which the facts do not furnish, and at which even folly when coupled with humanity or justice, cannot smile. We are, besides, not in a theatre, but in a Court of law, and when Judges are to draw grave conclusions from facts, which not being under re-examination cannot be distorted by observation they will hardly be turned aside from justice by a jest. I therefore claim for the plaintiff the damages which the jury gave her under these directions from your Lordship, ' That they were so entirely within their province, that you would not lead their judgments by a single observation.' "

H. C. VAN ZYL.

ARRESTS.

[A REPLY.]

Under this heading in your last issue your correspondent, "An Attorney," asks three questions which he desires me to answer. As your space is limited, I shall endeavour to be as brief as possible.

1. Q.—(a) "Supposing no security is given, and that the plaintiff neglects to move the Court on the return day of the writ for its confirmation, what is the position of the arrested person ?" &c., &c.

A.—At p. 112 your correspondent will find that I have stated that. . . . "he (the defendant) *must be produced in Court.* . . . on the application for the confirmation of the writ." In the cases of *James v. Webb*, and *Aldridge v. Harcombe*, both quoted by me, Buch. Rep. for 1870, pp. 37-39, the Court decided that it was the duty of the Sheriff to produce the defendant in Court. If the

plaintiff fails to move for the confirmation of the writ, the defendant can move the Court for his discharge.

Q.—“Is he by the neglect of the plaintiff entitled to walk out of prison on the return day or must he remain in gaol indefinitely?”

A.—At p. 109 I say “The gaoler cannot release the defendant without judgment or consent of parties,” and I gave the references. At p. 110 I say, . . . “nor can he (the defendant) be discharged from gaol without authority of the Court &c.,” and again I referred to authorities.

Q.—“If the former, (that is by the neglect of the plaintiff, &c.), is he subject to re-arrest?”

A.—Yes, if the defendant is making fresh preparation for flight, otherwise not; see principles and references at the foot of p. 59; at page 61 I say, “a writ, &c., once issued stands for a summons, and no further arrest can be made without an order of a Judge.” A subsequent arrest therefore must be on application to a Judge, and not under 8th Rule.

Q.—“What penalty, if any, is the plaintiff liable to for his negligence?”

A.—None whatever. He loses the benefit of not having had the writ confirmed, that is all. It was *not his duty, but that of the Sheriff or gaoler, to produce the defendant*. If any one is liable, it will be the two latter officers, though it is not likely that they will forget their duty in this respect. But suppose they did, and they are not reminded by the defendant to produce him in Court, he will get very little, if any, damages. (For the principles see the references quoted by me on the pages mentioned).

2. Q.—“He asks for an authority on the statement, that no re-arrest upon judgment can take place *under the 8th Rule of Court, but only by an order of the Court or a Judge.*”

A.—From pages 58 to 62 he will find all the principles in answer to this question stated, *and all the authorities cited*; but more particularly at pp. 55 and 61 the cases of *Van Blommestein v. Van Blommestein*, 1 Foord, 81; *Fraser v. Sivewright*, 3 Juta, 342; *Harsant v. Pullinger*, *Ibid*; and at page 55 *Lippert v. Adler* (though this last case is not yet officially reported, I have correctly given the judgment).

I am surprised to hear your correspondent say that it has been the “custom of most of the practitioners in the High Court of

Griqualand on the return day of the writ to be prepared with a second writ of arrest . . . on judgment being given against the defendant on his leaving the Court to cause him to be re-arrested under Rule 8."

I know your correspondent cannot give a reference on this point to any text book or decision and therefore I shall not ask him for any. But I am quite sure that the practice which he says he has "occasionally indulged in himself," will not occur again without its being challenged. A practice of a Court might, by custom, become law when the law or practice has been doubtful, but an erroneous practice cannot alter the law.

In my too brief account—brief, because I have to study brevity, as I am writing for beginners.—I have correctly given the law and practice.

3. Q.—"If an arrest is void on the ground of any informality in any of the proceedings, and where the plaintiff might begin *de novo*, he is not liable for anything else beyond the defendant's costs in upsetting the proceedings."—Legal authorities for this statement?

A.—The very next sentence to the one here quoted beginning in the last line supplies the answer and gives the authorities. But as your correspondent refers to the cases of *Pullinger v. Harsant*, decided in the Court of Griqualand, and the case of *Whittle v. Campbell*, decided in the Supreme Court, by way of disproof of what I say, I am beginning to suspect that he has misunderstood me. I have a thorough knowledge of all the facts of both cases. Observe what I say: "If an arrest is void merely on the ground of any informality in any of the proceedings, and where the plaintiff might begin *de novo*, &c." To make my meaning more clear, I will illustrate it by an example. Suppose a person owes a debt and is making preparations to leave the Colony, and for which debt he might be lawfully arrested all the proceedings are in order except (and I have given a reference) that the *jurat* in the affidavit is wanting,—the writ is otherwise in order and the arrest duly made; the arrest will be set aside "*on the ground of informality in the proceedings*" by reason of the omission of the *jurat*. But what has the defendant to complain of? The arrest was in all other respects perfectly lawful, and the plaintiff might begin *de*

novo." So that the sole ground of "informality" is very different to where the arrest is "wholly illegal" *ab initio*. If the arrest should never have been made, because either it was not an arrestable cause or the defendant was privileged from arrest, then the plaintiff cannot begin his action anew; and in such a case the defendant has an action for damages against him for false arrest.

In the case of *Whittle v. Campbell*, both the then Magistrate of Queenstown and the then Magistrate of Capetown misconceived their duties as to a civil arrest. Queenstown sent a telegram to Capetown that "a warrant had been lodged with him for the arrest of Whittle under the 8th Rule of Court." Capetown without enquiry, and believing it to be a criminal case, had Whittle criminally arrested by a policeman and lodged in the criminal ward with other prisoners. Here the arrest *should never have been made and was wholly illegal and void ab initio*, and accordingly Whittle got damages against the then Magistrate, Campbell, who caused the arrest to be made.

In the case of *Pullinger v. Harsant*, the Supreme Court set aside the arrest (see 3 Juta, p. 343) because she succeeded in satisfying the Court *that she had property in the Colony sufficient to meet the claims, and that she was not leaving the Colony for good*. In this case also the arrest *was void ab initio, and should never have been made*, and the plaintiff could not begin *de novo*. In neither of the cases mentioned was there a question of informality only.

But I come now to the judgment of the High Court of Griqualand West in *Pullinger v. Harsant* (2 Lau., 111). The action was for malicious prosecution and trespass. The Court held that the plaintiff failed to prove malice but there was a trespass, and founded their decision on *Collett v. Foster* (2 H. and N., 356). On reference to this case it will be seen that the English Court founded, in turn, their decision on *Barker v. Braham* (2. W. Bl., 866). Now in neither of these two English cases, was there a question of "informality" only, but the Courts set aside the arrests *because they should never have been made as they were not arrestable causes*. In England, in such cases, the action is either for malicious prosecution, or for trespass or for both. With us it is for malicious prosecution if it affects criminal proceedings or for false arrest in civil matters if the writ should

never have been issued or for both—but we never use the term “trespass” in such a case. The only time I ever saw it used in this Colony is in Counsel’s declaration in the Griqualand West Court where he copied the form of action in *Collett v. Foster*. I cannot find a single case reported in England or in the Dutch Books, where a writ was set aside on the bare ground of an unimportant “informality” only of any of the documents. In those countries no arrest can be made without an order of a Judge. With us it is of course different in those cases, where we can arrest under the 8th Rule without such an order owing to the great power given to the plaintiff by that Rule. Nor can I find a single case in this Colony where an action has been instituted and damages given on the mere ground of the informality of the proceedings on an arrestable cause. The difference I wish to be observed by your correspondent between “informality” and “illegality” is well stated by Lord BRAMWELL in the case of *Collett v. Foster*. “This is not the case of a thing which might have been done, but was done irregularly; it was an act wholly illegal.”

In conclusion, I beg to assure “An Attorney” that I welcome his criticism. I trust he and others will continue to criticise as severely as possible. I shall not take it amiss, but endeavour to profit by it. Any errors I will gladly admit, and rectify. My object is to have the different subjects as correctly given as I can for young beginners. It will also be to my own benefit, as it will help me out of my own errors, and perhaps save my clients costs, and myself disappointment.

C. H. VAN ZYL.

REVIEW.

THE RESIDENT MAGISTRATES’ COURT ACT.*

Mr. M. B. Robinson has with the assistance of Mr. Curlewis attempted to do for the Magistrates’ Court Act of 1856 what Mr. Justice BUCHANAN did for the Insolvent Ordinance No. 6 of 1843.

*The Resident Magistrates’ Court Act 1856, with notes, circular instructions and decisions thereon, by Macleod Bawtree Robinson, Additional Resident Magistrate of Kimberley, and John Stephen Curlewis, B.A., LL.D., Advocate of the Supreme Court. Capetown: W. A. Richards & Sons. 1888.

The principle of the work is similar to the system maintained in the well-known *Decisions in Insolvency*; each section of the Act being followed up by the head notes of all the reported decisions of the Colonial Courts on the effect or interpretation of such section. The work of course is chiefly one of compilation, but in doing it the editors have evidently taken great pains; and we venture to hope that their work will meet with as large a circulation as it deserves, in which case it will be in the hands of most of the Civil Servants and nearly every lawyer in the Cape Colony. In a book of this kind as indeed in all legal books of reference one of the most important parts is the index, in this case the index occupies about 40 pages, and is an instance of the care and industry of the editors. The short summary of the sections which precedes the index proper seems to us a waste of labour and printers ink. No one is likely to refer to a summary of a section for the law on any particular point, and if he did he would be a fool for his pains. If anything could militate against its success it would be the binding and general get-up of the book which reflects very little credit on the publishers. A comparison of the get-up of this book, which is bound together like a bundle of tracts, with either of the editions of Mr. Justice BUCHANAN work cannot fail to be greatly to the disadvantage of the Colonial workmanship. If this be a specimen of Colonial publishing, may it be long before any Colonial law writer entrusts his work to the tender mercies of the Colonial printer.

DIGEST OF CASES.

SUPREME COURT.

(Unreported decision of the Chief Justice, Sir John H. De Villiers).

Ex parte Heirs of the late W. A. Richards. (In Chambers, 7th September, 1886).—This was an application in terms of § 23 of Act No. 5 of 1884, for an order instructing the Registrar of Deeds as to the amount of transfer duty payable on a sale in respect of which partial exemption was claimed under Sub-Section 2 of Section 19 of above Act. The facts were as follows:—The late W. A. Richards was owner of nine-twentieths of certain landed property in Port Elizabeth, valued at £8,700. Mr. Richards left nine children, four of whom joined with a stranger in blood to buy their father's share for £3,915, being nine-twentieths of the Divisional Council valuation of the entire property. On behalf of these

four it was claimed that each of them was entitled to exemption on so much of the share purchased by him, as would have devolved on him had his father died intestate, i.e., one-ninth of £3,915. They accordingly tendered duty on the following calculation:—

4 per cent on £3,915	£156 12 0
Less claimed for exemption, 4 heirs each on one-ninth of £3,915, 4 per cent. on £435 or £17 8s each ..	69 12 0
Amount tendered	£87 0 0

The Civil Commissioner instructed by Government refused to accept this calculation, and claimed duty as follows:—

On one-fifth of £3,915, £783 in full	£31 6 5
And on four-fifths of £3,915, £3,132, less four-ninths of £3,132, £1,392, £1,740	69 12 0
	£100 18 5

The matter was argued by Messrs. Fairbridge & Ardene for the Heirs, and by the Registrar of Deeds for the Government, on 6th September, 1886, and on the next day the following order was made.

The four sons of the deceased have purchased four-fifths of the land in question for £3,915, less £783 total £3,132. By Sub-section 2, Sec. 19, of Act 5 of 1884 they are not chargeable with duty upon so much of this purchase money as represents their share in the property so purchased by them considered as heirs *ab intestato*. The deceased left nine children, and therefore the four sons are not chargeable with duty upon four-ninths of £3,132 equal £1,392. Duty is therefore payable by them upon the difference between £3,132 and £1,392 equal £1,740. Duty is payable by Walton on £783 being one-fifth of whole purchase price. It follows therefore that the whole duty claimable is on £1,740 plus £783 equal £2,523. The contention of the Government was therefore sustained.

Re Mahonga's Estate. (Nov. 13).—Applicant stated he was entitled under the Natives' Succession Act, to inherit a farm possessed by and registered in the name of his late father, but the Registrar of Deeds refused to pass transfer without an order of Court. A rule *nisi* was granted calling upon all parties interested to show cause why the order should not be granted; the Court intimating that if any dispute arose as to applicant's right, the matter might be referred to the Magistrate for decision under the Act.

Moore v. Liquidators Cape Commercial Bank. (Nov. 13).—Attorney's and Notary's charges are of such a liquidated nature that they may be set off against a claim for calls upon shares in a Company in liquidation, after all the creditors of the Company having been paid.

Van der Merwe v. Van der Merwe. (Nov. 13).—The Court interdicted the paying over of more than half the amount of an inheritance payable to a husband, pending the result of an action instituted by the wife (to whom he had been married in community) for the restitution of conjugal rights or for a divorce.

Re Fritsch. (Nov. 20).—Where under Act No. 38, 1884, application is made to the Court for the rehabilitation of an insolvent after a lapse of four years from sequestration, without the consent of creditors, notices will have to be given and the same practice followed as was the rule in application for rehabilitation under the repealed Act No. 15, 1859.

Capetown Town Council v. Murray & St. Leger. (Nov. 21-22).—Under the Capetown Municipal Act No. 44, 1882, the Council may impose a landlords' rate not exceeding 3d. in the £, and a tenants' rate not exceeding 1d. in the £, one of these rates to be applied to general municipal purposes, and the other to the water supply. The Town Council imposed on the landlords a rate of 2½d.

for general purposes, and a rate of $\frac{1}{2}$ d. for water supply, and also imposed a tenants' rate of $\frac{1}{2}$ d. *Held*, That only one landlords' rate could be recovered, and the defendants having paid the rate of $2\frac{1}{2}$ d., were not liable for the second rate of $\frac{1}{2}$ d. As the tenants' rate was not stated to have been imposed either for general purposes or for water supply, the defendants as tenants were held liable to pay such rate, although if the same was not properly applied by the Council, they might hereafter be entitled to redress. The Council were not entitled to apply both landlords' and tenants' rate to general purposes.

Colonial Government v. Dreyer. (Nov. 22).—The defendant hired and one X leased a farm for a period of ten years, at £60 a year. The written document of lease was not stamped, and on the lessor becoming insolvent, the document came into the custody of the Master, who called attention to the fact. The Treasury thereupon sued defendant for £50 as a penalty for not stamping the document. An exception that a declaration setting forth these facts disclosed no cause of action, sustained with costs.

Mackay v. Wheeldon. (Nov. 22).—A post-cart contractor held liable in damages for loss suffered through the negligence of the cart-driver in improperly trying to cross a swollen stream.

Barkly East Municipality v. Collector of House Duty. (Nov. 22).—The Collector of House Duty recovered judgment in the Magistrate's Court against the defendants as owners of certain huts in a native location for house duty which had not been paid by the tenants. The Collector stated that he had on one occasion visited the location and found the majority of the huts unoccupied, the inhabitants having left the location. On appeal, the judgment of the Magistrate was reversed, on the ground that the Collector had not shown that he had exercised reasonable diligence in attempting to recover from the tenants.

Thwaites v. Vander Westhuisen. (Nov. 23).—The plaintiff sued the defendant in the Magistrate's Court on an account. On the day of hearing plaintiff made default, and the Acting Magistrate stated that in the absence of endorsee he could not give absolution from the instance, but dismissed the case with costs. Plaintiff afterwards took out a second summons, and on the day of hearing the defendant took exception on the ground of the former decision, apparently virtually setting up a defence of *res judicata*. The Magistrate sustained the exception, and dismissed the second summons with costs. On appeal, the Magistrate's decision was reversed, as plaintiff was entitled under Rules of R. M. Court, Nos. 31 and 32, to bring a fresh suit on payment of the costs of the first case.

Queen v. Clapham. (Nov. 23).—The prisoner was tried in the Transkei by a combined Court of Magistrates on a charge of murder, and was convicted and sentenced to death. He appealed on the ground that the evidence did not show malice, that he was at the time suffering from *delirium tremens*, and that the evidence was insufficient; but the appeal was dismissed, there being evidence to support the verdict. The Transkeian Code, §§ 27 and 28, substantially embodies the common law of the Colony as to the effect of intoxication in cases of persons committing crime.

Diering v. Melville & Leslie. (Nov. 26).—Process ordered on motion in aid of a judgment of the High Court, to attach property in Hopetown district. (*Vide* Act No. 39, 1872, § 15).

Craddock Divisional Council v. Hattingh. (Nov. 26).—At the last periodical period a farm was valued for Divisional Council purposes. Afterwards a defined one-half the farm was sold and transferred to defendant. The defendant held liable for one-half the amount of Divisional Council rates levied on the farm.

Esterhuisen v. Le Roux. (Nov. 27).—The plaintiff sued in the Magistrate's Court for the balance of an account for wages, reduced by payments, &c. He annexed to the summons and served on defendant a detailed account, but not giving dates. At the trial the defendant took exception that a correct and

specified account had not been rendered. The Magistrate sustained the exception and dismissed the case. On appeal, the exception overruled and case remitted. (*Vide* Rule of R. M. Court, No. 10).

Geddes v. Trustees Kaiser Wilhelm Reef Gold Mining Company. (Nov. 27).—Plaintiff took shares on a prospectus stating that the Company would be registered with limited liability. As considerable time elapsed and the registration was not completed, plaintiff instituted proceedings to have his name struck off the roll of shareholders and his calls repaid. Shortly after the registration was completed. At the trial the defendants showed that circumstances had in spite of their endeavours delayed the registration. The High Court dismissed the case. On appeal, the judgment of the High Court was sustained on the ground that under all the circumstances there had not been an unreasonable delay in completing the registration.

McArthur, Forrest & Co. v. Siemens. (Nov. 28).—Where it is sought to repeal letters patent granted for an invention under Act No. 17, 1860, the procedure will be for the aggrieved party to present a petition to the Court, on which petition the Court will direct the issue of a writ to stand as declaration on the action, the complainant to comply with the provisions of the 32nd section of the Act as to serving particulars of complaint. The defendant will then file his pleas, and the case will be tried in the usual form.

Nel v. Halse. (Nov. 28).—The plaintiff sued for damages sustained by reason of two dogs alleged to belong to defendant having killed six ewes and a lamb. Defendant proved that one of the dogs was not his nor under his control. The Magistrate gave judgment for plaintiff for half the damages sustained, defendant to pay only half the plaintiff's costs. On appeal, as the dogs appeared to have acted jointly and in concert, the Court altered the judgment to one for plaintiff for the full amount of damage suffered, with costs in both Courts.

Solomon v. Christian. (Nov. 29).—The plaintiff residing at King-williamstown, employed one S, a local broker, to sell certain diamond shares. S communicated with defendant, a broker at Kimberley, who sold the shares at an advance of 12s 6d per share on the price quoted. Defendant shared the commission with the local broker, but remitted only the quoted price, keeping the 12s 6d alleging that he had acted as jobber and had resold the shares on his own behalf. The plaintiff sued for the 12s 6d per share and also for £2 dividends which were specially reserved in the broker's note. The Magistrate gave judgment for plaintiff as prayed, with costs. An appeal from this judgment dismissed.

Queen v. Sampson. (Nov. 30).—The Crown Prosecutor can remit, under Act No. 43, 1885, a charge of contravention of the Medical Ordinance to the Magistrate for trial; but the Magistrate is limited in the punishment which he may impose to the penalty provided in the Ordinance itself, so long as such penalty does not exceed the limit of jurisdiction conferred by Act No. 43, 1885. Where evidence of two distinct contraventions of the Medical Ordinance had been taken at a preliminary examination, and the whole case had been remitted to the Magistrate, the Magistrate cannot impose for the two offences a higher fine than £50, that being the limit of jurisdiction conferred by Act No. 43, 1885.

SUPREME COURT, TRANSVAAL.

Lawley v. Van Dyk.—*Lease of mineral rights declared forfeited by reason of non-payment of rent as stipulated in the lease.—Public holiday.* (August 18).—Van Dyk leased to Lawley and others, by notarial agreement, the mineral rights in and over his farm, Witpoortje, for the period of five years, at an annual rental, payable in advance, of £400, with the right of renewal for another five years at a rental o

£500 a year. It was stipulated in the lease that the rent should be due and payable on the first day of January of each year, and the lease also contained the following clause: "And it is further stipulated, and shall be a special condition of this deed of lease, that if the rent be not paid on the day when due as hereinbefore mentioned, this lease shall immediately thereby be forfeited, and be void and of no effect, without any recourse by the one party against the other." On the 1st of January, 1888, no rent was paid, the 2nd of January was proclaimed a public holiday by the Government, and when on the 3rd of January the rent was tendered to the lessor he declined to accept it, on the ground that the rent not having been paid when due, the lease was at an end. Plaintiffs thereupon brought an action praying the Court to declare that the lease was still of force and effect, and claiming £1,000 damages by reason that they had been hindered and prevented by defendant from exercising their rights under the said lease. The defendant took the following exception: "And the defendant before pleading to the plaintiff's summons takes the following exception thereto, in that the summons discloses no ground of action against the defendant, inasmuch as by clause 6 of the contract of lease annexed to the summons the said lease becomes forfeited without notice if payment of rent be not made on the day specially stipulated."

Morice, with him *Burgers*, in support of the exception, referred to Voet 2, 12, §§ 2, 5, 6; Kersteman, in *voce* Feestdagen; Holl. Consult., Vol. 4, Cons. 75.

Wessels, *contrâ*: The 1st of January, 1888, was a Sunday, which is a *dies non*; and the 2nd of January was proclaimed a public holiday (Heineccius *Wissel Recht*, edit. Reitz, p. 238). The Government has the power to proclaim public holidays, and the Judge has an *arbitrium* in a case like the present (Dig. 45, 1, l. 135, § 2; Watson's *Compendium of Equity*, Vol. 1, *voce* lease, p. 495). The passages from Voet are of no application. The money was tendered on the 3rd, the first day after the Sunday and proclaimed holiday.

Morice in reply cited Pothier on *Obligations*, edit. Van der Linden, Vol. 2, p. 211; Woodfall, *Landlord and Tenant*, p. 285, 11th ed.)

The Court (KOTZE, C.J., JORISSEN and DE KOETE, JJ.) held that, assuming the 2nd January had been properly proclaimed as a public holiday, it is clear the parties expressly stipulated that rent should be paid on the 1st day of January of each year, and on non-compliance therewith the lease should be at an end. They must be taken to have known when they entered into the contract that the 1st of January is by the local law a public holiday, and therefore the lessees cannot now avail themselves of the fact that the 2nd of January had been proclaimed a holiday by the President, and so escape from the consequences of their own deliberate stipulation. The tender of rent on the 3rd of January was therefore insufficient, and the exception must be allowed with costs (*vide* Kersteman, in *voce* Huur).—Attorneys: *Scholtz*; *Rooth*.

Rooth v. The State.—*Condictio indebiti.*—*Mistake of Law.*—*When the text books of Vander Linden, Van Leeuwen and Grotius are silent on any point of law, or do not treat it with sufficient clearness, the Courts of law in the Transvaal must administer the Roman-Dutch Law in a reasonable way, and in accordance with the general custom of South Africa.*—*Money paid in mistake of law cannot, as a rule, be recovered.* (Sept. 27, 1888). A special case was submitted for the decision of the Court, the point to be determined being whether the purchasers of claims on a proclaimed gold field, who had paid duty upon the transfer of such claims, were entitled to recover back from the Government the transfer duty so paid, inasmuch as the Supreme Court had recently decided in the case of *Dell v. The State* that prior to the Law No. 9 of 1888, the transfer of claims was not subject to such duty. The applicants had paid under the impression that they were under a legal liability to do so, and because the Gold Commissioners refused to register the transfer of the claims unless upon payment of duty.

Wessels, with him *Morise*, for the applicants: By the Thirty-Three Articles, and the Supplement to the Grondwet, the Court is bound to enforce the law, as laid down by Van der Linden, Van Leeuwen, and Grotius, all of whom state that money paid in error can be recovered back. They draw no distinction between a mistake of law and of fact, and Grotius (3, 30, 6) puts it very clearly that we may claim back anything paid in mistake of law as well as in mistake of fact. So likewise Van Leeuwen in his Cens. For. (4, 14, 3), and Van der Kessel (Th. 796) is of a similar opinion. The Dutch Juris Consult (Vol. 4, cons. 9, p. 24-5), Huber, Peckius, Cocceius, Pothier, Leyser, Burge, Vinnius and D'Aguesseau are to the like effect. The *condictio indebiti* is founded *ex aequo et bono*, and both Vinnius and D'Aguesseau strongly urge this in support of the right to repetition. Such was also the opinion of Papinian (Dig. 22, 6, 1. 7 and 8). The interpretation of this *lex* by Cujacius has been completely refuted by D'Aguesseau. No one should be allowed to enrich himself by the *bona fide* mistake of another, whether it be of law or of fact; and there are several other *leges* in the Digest in favour of the *condictio indebiti* in case of a mistake of law. (Dig. 12, 6, 2, 1; *ib.*, 1. 4 and 5; 1. 26; 1. 32; 1. 59; Dig. 34, 2, 37; Dig. 50. 1, 17, 10). Modern writers express a similar view, (Meins, Vol. 2, p. 160; Mühlenbruch, Doct. Pand., Vol. 2, § 378; Modderman, p. 168). Even in English law there seems a growing tendency in favour of the right to receive back what has been paid in error of law (Pollock on Contracts, p. 459; *in re Sir John Carnac*, Times L. Rep., Vol. 2, p. 18, *per* BAILEY, M.R.; and *per* Lord WESTBURY in *Cooper v. Phibbs*, L. R. 2, H. L. Ca. 170).

Leyds, A.G., contrâ.—The question here is whether there is any difference between the Roman-Dutch and the Roman law on the subject. Van der Kessel (Th. 796) is the only authority who attempts to draw a distinction, and upon very slender grounds. In his Thesis 22 he says, however, that where general custom or decisions fail in Holland, recourse must be had to the Roman law, and he admits that according to the correct interpretation of the Roman law no action lies for that which has been paid in mistake of law. It is now generally conceded that the *condictio indebiti* in case of *error juris* does not lie. The argument founded *ex aequo et bono* cannot prevail where the law is clear (Voet 12, 6, 7). No one has yet refuted what Glück in his Commentary on the Pandects has so elaborately expounded on the subject. The passage in the Code l. 10, *de ignorantia juris et facti* is conclusive on the point. The l. 7, Dig. 22, 6, is not applicable, for where anything has been voluntarily paid to another it has become his property, and there can no longer be any question as to *suum potentibus*. The best civilians, such as Cujacius and Donellus, are against the *condictio indebiti* in case of *error juris*; and such is also the opinion of the modern school (Windscheid Pandekten Regt., Vol. 2, p. 608).

Wessels in reply.—*Cour. adv. vult. Postea*, Oct. 2nd.

KORTZ, C.J.—The point which the Court has to decide in this case is, whether transfer duty paid by the applicants upon the sale of claims on the Gold Fields can be recovered back upon the ground that such payment was made by applicants under the impression that they were legally compellable to do so; whereas the Court recently held in the case of *Dell v. The State* that transfer of claims prior to the Law No. 9 of 1888 was not subject to the payment of transfer dues. In other words, whether the applicants are entitled to the *condictio indebiti* by reason of their alleged mistake of law? Mr. Wessels, in a very learned argument, maintained with great force that this question should be answered in the affirmative, inasmuch as Van der Linden, Van Leeuwen, and Grotius give it as their opinion that money paid in mistake of law can be reclaimed, and according to the Appendix No. 1 to the Grondwet (Local Laws, p. 116) the Court is bound to follow the text-books of these three writers. But in answer to that, I must observe that the Appendix in question likewise provides that in the interpretation and use of these three text-books the Court shall always proceed in the manner prescribed by § 31 of the

Thirty-three Articles, where it is laid down, "In all instances wherein these (i.e., the local) laws fail, the Dutch (i.e., the Roman-Dutch) law shall serve as a basis, yet upon a reasonable system and in accordance with the usage of South Africa, and for the benefit and welfare of the community." It is plain, therefore, when the three Roman-Dutch writers mentioned in the Appendix are silent on any given point or do not treat it with sufficient clearness, that not only is an *arbitrium* or discretion left to the Court to depart from what they have laid down, but that we are bound to follow that course, for the provision is imperative, "in using these three text-books the Court shall always proceed, &c." Now in Van der Linden (p. 170, Dutch ed.) and Van Leeuwen (Roman-Dutch Law, 4, 14, 4) it is said, in very general terms, that payment of that which one did not owe can be recovered back, if such payment has taken place in error; and in support thereof reference is alone made to the title *de condictione indebiti* in the Digest (12, 6). Of the difference in the Corpus Juris between ignorance, or error, of law and of fact, and the various *leges* therein, no mention whatever is made by these writers. Van der Linden, it is true, also refers to Grotius (3, 30, § 6) where we read that he who has paid in mistake of law can recover back what he has so paid; but the question still remains, upon what authority does this opinion of Grotius rest? In support of the view of Grotius, Groenewegen has, in his edition of the Introduction, noted a few *leges* from the Pandects, but at the same time he cites the *lex*. 10, Cod. 1, 18, and certain jurists, who differ from the doctrine of Grotius. Chief Justice SCHÖRER in his Commentary on Grotius follows Voet (12, 6, 7), and disagrees with Grotius; Van der Keesel (Th. 796), although admitting that by the civil law the right to recover back money paid in mistake of law is not recognised, and that no general custom nor decided case to the contrary exists in Holland, is inclined to agree with Grotius, but upon very insufficient reasons. It is therefore impossible to maintain that Van der Linden, Van Leeuwen, or Grotius has satisfactorily or with clearness discussed the important and interesting question, whether the *condictio indebiti*, lies for the recovery of that which has been paid in mistake of law? And we are consequently not bound by what they have said in mere general language on the point, but must have recourse to the Civil Law, to which they also appeal; especially as no provision whatever is to be found on the subject in the old law of Holland, and under such circumstances Van Leeuwen (1, 1, 11), and Van der Linden (p. 3, Dutch ed.), themselves say we must at once refer to the Roman Law (*cf.* Van der Keesel, Th. 18 and 22). In the Corpus Juris the payment of that which was not due, and the subject of mistake in law and of fact, are treated in two titles (Dig. 12, 6, and 22, 6, Cod. 1, 18, and 4, 5). The Commentators and expounders of the Roman Law are all agreed that money paid in mistake of fact can be recovered back; but they differ considerably upon the point whether what has been paid in mistake of law can be reclaimed? Among those who answer this question in the affirmative we find Van Leeuwen (Cens. For., p. 1, lib. 4, 14, 3); Huber (Jus Hodiernum, 3, 35, 1-2, and Prælect. ad. Instit., 3, 28, 8); Cocceius (Exercitat. 2, disput. 11, n. 6); Peckius (de test. Conj., lib. 1, 38, n. 8-9, although not quite so clearly); Carpovicius (Jurispr. Forens., pt. 3, Const. 15, def. 42); Vinnius (Select Quæst., 1, 47); D'Aguesseau (Dissertat. in Append. ad Pothier, *per* Evans); Holl. Consult. (4, p. 24); Leyser (Med. ad Pand., vol. 5, p. 1-2); Mühlenbruch (Doct. Pand., § 378); while Cujacius (vol. 7, 895); Donellus (L., 21); Merenda (Controv. jur., l. 21, c. 23); Brunneman (ad. cod. 1, 18, l. 18); Domat (lib. 1, 18, § 1, n. 13 and *seq.*); Voet (12, 6, 7); the jurist in the Aanhangel to Kersteman's Woordenboek (*in voce indebitum*); Glück (Pandekten, vol. 13, § 834, and vol. 22, §§ 1186-89); Savigny (System, vol. 3, Bylage, XXXV. and *seq.*); Mackeldey (Systema Juris, §§ 165 and 469); Goudsmit (Pandekten Systeem, § 52); and Windscheid (Pandekten Recht., § 426, n. 3, *et in notis*) maintain the contrary. Vinnius and D'Aguesseau have on their side discussed the matter very fully, and their opinion is chiefly based on

considerations of natural equity. They say that the *condictio indebiti* is founded *ex æquo et bono*, and no one is allowed to enrich himself through the loss of another, which would be the case if anyone who has paid in error of law is not permitted to recover back what he has so unjustly paid. They also urge that in the title *de condictione indebiti* no distinction is drawn between mistake in law and mistake of fact. These arguments appear to me sufficiently refuted by Voet, Glück, and Savigny, who observe that where the *leges* are clear and specially lay down as a well-recognised rule (or, as Windscheid puts it, axiom) of law, that in case of *error juris* the *condictio indebiti* does not lie (*vide* Cod., 1, 18, 10, Dig. 22, 6, 9, pr.) there there can be no question of natural equity; and that although in the chapter *de condictione indebiti* no distinction is made between *error juris* and *error facti*, it is plain that where this chapter merely treats the subject in general it cannot impair the force of other and later passages in the *corpus juris*, where such distinction is specially drawn. Savigny (l. c. note a) says that Glück, who first emphatically denied the right to the *condictio indebiti* (vol. 13, § 834) in case of a mistake in law, subsequently (vol. 22, § 1186-9) after the appearance of Mühlenbruch's essay became so involved in doubt that the reader cannot possibly comprehend him. I have carefully read both chapters in Glück, and find no justification for this remark. In his later chapter (vol. 22) Glück in several places confirms what he had previously more fully given as his opinion in the title *de condictione indebiti* (vol. 13). D'Aguesseau also strongly relies on the lex. 7 and 8, Dig. 22, 6, where Papinian says: "Ignorance of the law is of no avail to those who seek to acquire (something); nor does it prejudice those who seek their own (*sum potentibus*) * * * but ignorance of the law never prejudices in averting a loss in one's own." Now, it is quite useless to investigate whether the explanation of this passage given by D'Aguesseau be the correct one, for even if it be granted that (as D'Aguesseau wishes it) the words *sum potentibus* indicate that Papinian was of opinion that the *condictio indebiti* ought to be allowed in case of a mistake in law, inasmuch as he who has unjustly paid what is not due, seeks but to recover back his own, such opinion cannot prevail against the express language of the lex. 10, cod. 1, 18, where we read "Whenever anyone has in ignorance of the law paid a sum of money, the action to recover it back ceases. For you are aware that the right to recover back what has been unduly paid is only allowed by reason of a mistake of fact." And this (as Glück has pointed out) is supported by the lex. 9, Dig. 22, 6, where Paulus says: "It is indeed a rule that ignorance of the law prejudices, but not also ignorance of fact." (Et vid. per Paulus, d. l. 9., § 5; per Ulpian, l. 29, § 1, Dig. 17, 2; per Papinian, l. 48; pr. Dig. 46 1). And even Van der Keessel (Th. 796), who is inclined to agree with Grotius, is forced to admit that, according to the correct interpretation of the Roman Law, the *condictio indebiti*, or action for the recovery of money paid in mistake of law, cannot as a rule be allowed. It is, indeed, true that this rule is not without exceptions, not merely in the case of the so-called privileged persons, as women, minors, soldiers, &c., but also in the case of those to whom otherwise the rule *ignorantia juris neminem excusat* would be applicable. In such exceptional instances, however, there is always some special equity, the admission of which is not contrary to the rule as laid down in the *Corpus Juris*. Hence, Mr. Justice CONROD says: "Whatever difference of opinion there may be upon that question, there is no difference on this, that there must be a natural equity on the side of him who claims the *condictio indebiti*." The learned Judge also observes that Merula is against the *condictio indebiti* in case of mistake of law; and that Huber, a later writer than Voet, is of a contrary opinion. The mention of Merula as an authority on the point is probably a misprint for Merenda (controv. jur. l. c.) In like manner Huber is an older writer than Voet, and the reference in the *Praelect ad Instit.*, 3, 28, 8, to Voet, ad § 6, *Instit. d. t.* refers to Paul Voet, the father, and not to his son, the illustrious commentator *ad Pandectas*. Some of the *leges* containing exceptions to the general rule are

discussed by Glück (§ 834) and Modderman (§ 79). It appears to me, however, that the jurists of our own time, regard being had to these exceptions, are more or less inclined to adopt a middle view, and (as Glück expresses it) discard the distinction between mistake of law and mistake of fact, and simply consider if the error, whether *juris* or *facti*, be excusable (*verzeihlich, entschuldbar*) or not. (cf. Thibaut, § 29, and Savigny l.c. note (a) thereon; Mackeldey, Lehrbuch, edit, 1862, § 165 and 467; Goudsmit, § 52; Modderman, § 79; Windscheid, § 79a, and § 426, n. 3). Whether according to the strict interpretation of the Roman Law, we are justified in adopting this view of the modern school as correct is a question upon which I need not enter. For, even admitting the correctness of that view, there exists no element of excusability in the present case. The applicants at Johannesburg and Krugersdorp say they paid transfer dues to the Mining Commissioners upon the transfer of claims in the years 1887 and 1888 because the Commissioners refused to register such transfer unless upon the payment of transfer duty. Both parties appear to have been in error, and now the applicants seek to avail themselves of their mistake in law, and to recover what they have already paid. Here the rule, as laid down in the Code, must clearly prevail; for the applicants have voluntarily paid, and have acquiesced therein, until this Court on the 4th September decided that prior to the Law No. 9 of 1888, no transfer dues were payable on the transfer of claims. Applicants could have availed themselves of legal advice, and if they differed from the Mining Commissioners as to their liability to pay transfer duty they could have paid under protest and have appealed to the Courts of law. "One who makes a payment," says Bishop, an American writer on Contracts, § 631, "supposing himself compellable while he is not—that is, pays under a mistake of law—cannot recover the money back. In legal contemplation, his act was voluntary." I must also observe that the *onus probandi* that the applicants come under the exception and not under the rule, lies on them; and in the case submitted to us I find no circumstances set forth which would take it out of the operation of the general rule. I can discover no equity in favour of the applicants, but rather the reverse; and here I wish to point out that the rule "*ignorance of the law is no excuse*," and the disallowing of an action for the recovery of that which has been unduly paid, do not conflict with the principles of the *aequum et bonum*; and in support of this, reference may be made to what Storey says in his Equity Jurisprudence (§ 111): "It is a well-known maxim that ignorance of law will not furnish an excuse for any person, either for a breach, or for an omission, of duty; *Ignorantia legis neminem excusat*; and this maxim is equally as much respected in equity as in law. It probably belongs to some of the earliest rudiments of English Jurisprudence; and is certainly so old as to have been long laid up among its settled elements. The probable ground for the maxim is that suggested by Lord ELLENBOROUGH, that otherwise there is no saying to what extent the excuse of ignorance might not be carried. Indeed, one of the remarkable tendencies of the English Common Law upon all subjects of a general nature is to aim at practical good, rather than theoretical perfection; and to seek less to administer justice in all possible cases, than to furnish rules which shall secure it in the common course of human business. If, upon the mere ground of ignorance of the law, men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice, from the nature and difficulty of the proper proofs. The presumption is that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them. And nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretence that at the time of parting with it he was ignorant of the law acting on his title. Mr. Fonblanque has accordingly laid it down as a general proposition that in Courts of equity ignorance of the law shall not affect agreements, nor excuse from the legal

consequences of particular acts. And he is fully borne out by authorities." A dictum of Lord WESTBURY in *Cooper v. Phibbs* (L.R., 2 H.L., 170) was cited to the effect that in the maxim *ignorantia juris haud excusat*, the word *jus* denotes the general law of the country, but when the word *jus* is used to denote a private right the maxim has no application. Now, with all due deference, Lord WESTBURY has here fallen into error, and I need only refer to the passages already given from Story and the Corpus Juris.; Burge, Vol. 3, 737-8; Pothier on Contracts, by Van der Linden, Vol. 2, p. 382; Austin's Jurisprudence, Lec. 25, and Holland's Jurisprudence, p. 91, *et in notis* 3rd ed. to prove this. I am accordingly of opinion that, under the circumstances of the special case which the parties have submitted for the decision of the Court, the transfer dues already paid cannot be recovered back, and that there should be no order with respect to the costs.

ESKLEN and DE KORTE, JJ., concurred.

HIGH COURT, ORANGE FREE STATE.

(Before DE VILLIERS and GREGOROWSKI, JJ.)

Delpont v. Committee under Scab Law. (2nd October).—Ord. 5 of 1887 repealed the previously existing Scab Law, but provided that the Committee for carrying out the old law should remain. *Held*, that as soon as the new law came into operation, the old law and all that had been done under it became of no effect, so that in order to impose the penalties the Committee must give the notices as provided by the new Ordinance, and could not avail themselves of notices issued under the old Ordinance.—*Fischer* for plaintiff.—*Steyn* for defendant.

Fourie v. The State.—Appellant had been charged with the crime of "Fraud," in that he had wrongfully sent certain cattle to the pound thereby to defraud A and obtain the pound fees. An exception was raised that he should have been prosecuted for contravening Section 27 of the Pound Ordinance, which provides certain penalties for unlawfully impounding cattle. *Held*, that the indictment was good.—*Bier* for plaintiff.—*Steyn* for defendant.

Marais v. Rosenthal.—Plaintiff had sued the defendant in an action of ejectment from a stand let monthly at £7 10s. per month. Respondent set up a verbal lease for five years, and excepted to the jurisdiction. The Landdrost rejected the exception without taking evidence, and heard the evidence on the verbal lease as a re-conventional claim and gave judgment for plaintiff. *Held* that the Landdrost should have heard evidence on the *bond fides* of defendant's exception, and if satisfied thereon, ought to have dismissed the action, and had no competence to decide on claim in reconvention (*Brady v. Michael*, 3 J., 178).—*Bier* for plaintiff.—*Fischer* and *Steyn* for defendant.

Van Wyk and Beukes v. Bester.—Plaintiffs had bought the farm "Culloden," and received transfer with the grant and surveyed chart annexed, and now brought an action to have the grant and chart cancelled, because the survey was defective and not according to the original inspection report of the farm, and ought to have included part of the ground now included in the grant and chart of defendant's farm. *Held*, that plaintiffs were not entitled to go behind the grant and chart according to which they had purchased, nor to claim any ground even though such might have been included in the original documents of Culloden.—*Steyn* for plaintiff.—*Fischer* for defendant.

CORRESPONDENCE.

SIR,—*Can process by edictal citation be sued out in the Colonial Courts where there is no property in the Colony which can be attached to found jurisdiction.*

As far as I have been able to ascertain, there is a widespread apprehension or misapprehension existing among the profession that this question should be answered in the negative. I first required an answer to this question some months ago in a case, of which I have no doubt, when a client was desirous of suing a certain large Syndicate of about 150 members for wages of servants employed by him on behalf and with the authority of the Syndicate. One of the clauses of the Articles of Association vested all moneys, acquisitions, and effects of the Syndicate in the Trustees, but the Deed nowhere authorised the Trustees or any one else to sue and be sued on behalf of the Syndicate. The question then arose, ought the Trustees to be sued, or in absence of such authority in the Deed, was it necessary to sue all the members of the Syndicate.

An attorney with whom I discussed the point contended that inasmuch as the Syndicate was an incorporated Joint Stock Company, it came under the provisions of Act 3 of 1873, and that clause 9 of that Act answered my question. The clause referred to reads as follows: "The Trustees for the time being appointed under or in conformity with the provisions of the 7th or 8th sections of this Act shall be and are hereby declared to be the owners in trust of all the immovable property granted or transferred to or for the benefit or purposes of the company, association, society or body for which such trustees shall have been appointed, agreed to in like manner as is hereinbefore in the second and third sections provided in regard to the Trustees and office bearers therein mentioned; and shall also be, and are hereby declared to be, the owners in trust of all movable property belonging to such company, association, society or body; and shall also be, and are hereby declared to be, invested in trust with all rights, and entitled to all claims, of such company, association, society or body, and to be subject as such trustees to all the liabilities of and demands against the same. But there is a clause in the Deed of Association of this Syndicate which says:

" Any member or members holding one or more share or shares in the Syndicate may sell the same to such person or persons as the majority of Directors of the Syndicate at any business meeting held as aforesaid may approve, but not otherwise, and upon such sale and approval the purchaser or purchasers of any such share or shares shall be registered and become a member or members of this Syndicate."

Now the interpretation clause of Act 3 of 1873 says: " The term 'company' shall comprise any company or co-partnership carrying on any trade or business in this Colony, whereof the capital stock shall be divided into shares transferable without express consent of all the shareholders or co-partners, and any, &c., &c."

But this Syndicate does not carry on its business in this Colony and the clause of the Deed quoted above excludes members from selling their shares without the consent and approval of the majority of the Directors, and therefore in my opinion a Syndicate with such a clause in its Deed of Association cannot be called an unincorporated Joint Stock Company subject to the provisions of Act 3 of 1873.

I may mention that an eminent counsel's opinion was taken on the point, and he said, " In my opinion the plaintiff is bound to sue all the members of the Syndicate. They are the persons with whom he contracted, and the mere fact that the property of the Syndicate is vested in the Trustees does not entitle the plaintiff to sue the Trustees as representing the members. Those members who have not signed the Deed should be joined as co-defendants in any proceedings which may be taken. They are clearly partners in the concern, as is proved by the fact of their having paid up the amount of their shares in it. The circumstance that they have not signed the Deed does not affect their position. Should judgment be given against the Syndicate, the members would be liable *singuli in solidum* thereon under the ordinary law relating to partnerships."

The position then is that, although the property of the Syndicate is vested in Trustees, and the Syndicate has an office and a Secretary in Kimberley, all the shareholders must be joined in the action, otherwise the plaintiff is liable to be upset on the exception of non-joinder, and consequently 150 summonses have to be issued

and served one on each of the members. But fifty of these live in foreign states and the majority of them possess no property in Griqualand West, and the question arises "Can process by edictal citation be sued out in the Colonial Courts where there is no property in the Colony which can be attached to found jurisdiction?" My impression is that it cannot, and the only exception to the rule that I know of is the case of divorce, where the absent spouse can be sued by edictal citation because, I suppose, of the principle *ubi uxor, ibi domus* and the absent spouse is supposed to be domiciled in the Colony. How then is the plaintiff to obtain redress? If he sues only those who are in Griqualand West, he is upset by the exception of non-joinder; on the other hand, he cannot sue those out of jurisdiction because they possess no property within it which can be attached to found such jurisdiction.

A. B. T.

NOTES.

HITHERTO the difficulties in cases regarding water rights in this Colony have arisen through the scarcity of that commodity. *Ludolph and others v. Wegner and others* (decided in the Supreme Court, 12th September, 1888), is quite a new departure. In this case the upper proprietors complained that the lower proprietors had obstructed the free flow of the water coming on to their land, and by doing so had caused the water to stagnate and to be thrown back upon the applicants' land. It appeared that the weather had been unusually wet, and the land in question was very flat. The CHIEF JUSTICE after discussing the law upon the subject said "The result of the authorities appears to me to be that, just as the upper proprietor may use a reasonable share of the water in a public stream for domestic and even agricultural purposes, even though he may thereby to some extent diminish the supply of his neighbours, so he may increase the flow into a channel which he is entitled to use, if such increase be occasioned in the ordinary course of draining, ploughing or irrigating his land, and be not

greater than is reasonable under the circumstances. Such being the rights of the upper proprietors, it follows that a lower proprietor may be compelled to remove any obstruction he may have placed to the free flow of water which the upper proprietor is entitled to discharge. Nay more, if through neglect the channel upon the lower land becomes choked and ceases to carry off the water which the upper proprietor is entitled to discharge into it, he may compel the lower proprietor either to cleanse the channel himself or to allow his upper neighbour to do it for him." The propositions established in this case will be found reported in 5 C.L.J. 245.

IN the course of the case of *Mitchell & Co. v. Purdey* in the High Court a short time ago, a very novel and interesting point was raised by the Counsel for the defendant. The case which is noticed in the digest of High Court cases published in the last number of this journal was one in which the plaintiffs, who had sued the defendant in the Magistrate's Court on a dishonoured cheque after the pleadings in that Court had closed, took advantage of a postponement of the hearing, withdrew the case without notice to the defendant, and applied to the High Court for provisional sentence. Mr. Joubert for the defendant then objected that the High Court had no jurisdiction, on the ground that the plaintiffs had already elected another forum, and that after *litis contestatio* the plaintiff cannot withdraw proceedings in one Court and reinstitute them in another. In support of this view he quoted Van Leeuwen, 2 p. 368 and note; Peckius on Arrest, Bk. 48, 4, 5 and note; Sande 1, 7, 1; Merula 4, 42, 5, § 8 and note; Voet 1, 2, 1, 23 and 24; Zangerus 2, 3; Gaill 1, 74, 4; Peckius de jure sistende 35, 2. The case, however, went off on another point, and the Court gave no decision on the exception raised by the defendant.

Now that attention has once been drawn it, we may expect to see the question brought before one of the higher Courts in such a manner as to necessitate a ruling one way or the other, for it is not infrequent for the injured plaintiff in one of the lower Courts, feeling dissatisfied with the way things are going there, to withdraw the proceedings and to seek the solace to be found in a higher

tribunal. If he continues the practice any longer he evidently does so at his peril.

THE carefully considered opinions of purely business men on questions of Mercantile Law are always valuable, and we are not surprised that in the course of the deliberations of the Associated Chambers of Commerce of Great Britain, which has just concluded its last annual meeting at Cardiff, many interesting points of law were brought under consideration. The general drift of the resolutions and discussions of the Association clearly shows that the commercial world, as represented at the Chambers of Commerce, is not at all satisfied with the expensive procedure of English Law. A resolution was proposed and passed almost unanimously, expressing the opinion that the fusion of the two branches of the legal profession was desirable, and would prove beneficial to manufacturing and trading interests. The *Times* says, in a leading article on the result of the sitting, that the resolution contains a sound argument and one quite convincing to the company to which it was addressed, but it goes on to say in a spirit of cynicism that it is not quite certain that equal weight will be given to the resolution in other quarters, and it fancies that lawyers might admit the premise without feeling themselves driven to allow that the conclusion followed from it. If the sarcasm be justified, it is only of English lawyers, and even as regards them it may be that the experience of the *Times* is not such as would lead it to take the most favourable view of legal morality. So far as the lawyers of this Colony are concerned we imagine that the conclusion as well as the premise would be readily accepted. But no amalgamation of the Bar and Side Bar would be wise or indeed possible until the standard of admission to the ranks of the Attorneys had been considerably raised. What is wanted is some system of legal education which would combine the theoretical studies of the barrister with the practical training of the attorney. Such a system is easily enforced, and it is the only possible precursor to that union of the two branches of the profession which the commercial representatives of Great Britain think would prove so beneficial to the trading and manufacturing interests of their country.

PERSONAL.

The inconvenience of a bi-monthly publication has from time to time been brought prominently to our notice, and the occasional unpunctuality in our issue is some evidence that this inconvenience has been felt by ourselves. It has been suggested that Subscribers and Contributors would be better served by a quarterly publication ; and after mature consideration, we cannot but acknowledge that such a course is preferable.

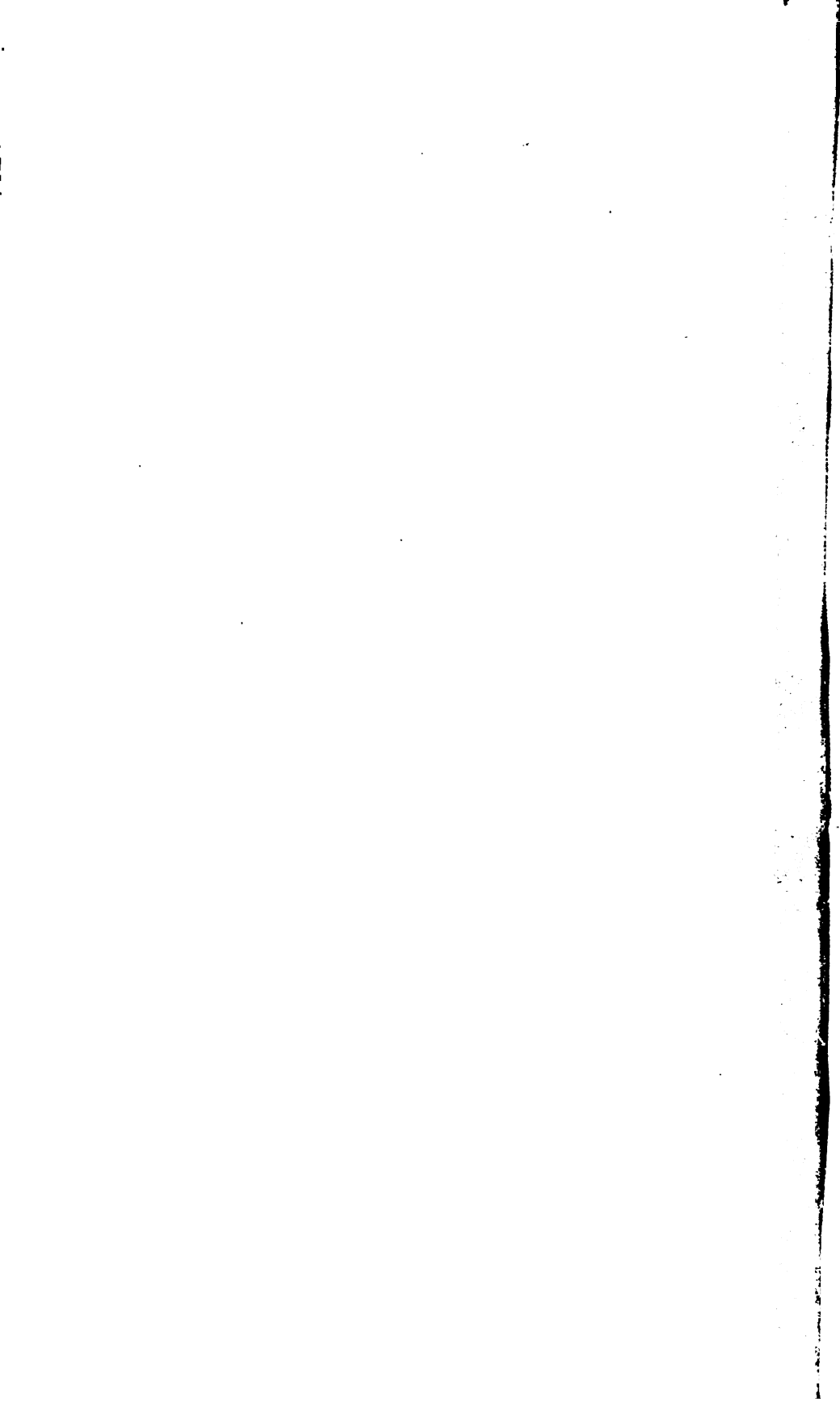
The *Cape Law Journal* having completed the fifth year of its existence, we may now fairly make the change, and this we have decided to do. This Journal will therefore in future appear as a quarterly, and will be published on the 15th of February, May, August and November. The amount of matter in the annual volume will be the same as, or rather more than, at present, each part being proportionately increased in size. The annual subscription will remain as before, but the price of each part will be increased to Three Shillings.

It is no mere boast to say that the *Cape Law Journal* has enjoyed five years of uninterrupted success. Of our failings we are quite aware, and with these in mind it is a source of much gratification to the Editor to know that the efforts of the promoters of this Journal have nevertheless met with such thorough support from able contributors and a long list of subscribers, and we venture to hope that the contemplated change will add to the value of the work.

END OF VOL. V.

C. L. E. B.

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